PART ONE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 25

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

MARQUETTE CEMENT MANUFACTURING COMPANY,
Respondent,

BRIEF FOR RESPONDENT.

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IN THE

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OCTOBER TERM, 1947.

No. 25.

FEDERAL TRADE COMMISSION,
Petitioner.

vs.

MARQUETTE CEMENT MANUFACTURING COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

PART ONE.

The purpose of this Brief is to discuss certain points involving due process of law which were raised by this Respondent in the Court of Appeals and which it is understood will not be covered by the briefs and arguments of other respondents in this Court.

PROCEEDINGS IN THE COURT BELOW.

The Court below set aside, upon the merits, a "Cease and Desist Order" of the Federal Trade Commission. This order restrained an alleged combination, or industry wide conspiracy, in restraint of competition in the

delivered prices at which manufacturers sold portland cement. Upon the theory that there were differences in the remainders obtained by deducting from the delivered prices the costs of delivering cement to each respondent's widely scattered customers, the Commission concluded that the **"Combination"** resulted in violations of the Clayton Act as amended by the Robinson-Patman Act (of 1936) which the Commission presumed was covered by its order restraining combination.

Jurisdiction.

The point that the Trade Commission proceeding was not, as it was labeled, a proceeding to restrain "unfair methods of competition" in violation of Section 5 of the Trade Commission Act and an alleged violation of the Clayton Act, but that it was in fact a proceeding to restrain a violation of Section 1 of the Sherman Act and therefore beyond the scope of the Trade Commission's statutory powers and duties, was briefed and argued at length in the Court below. However, after going through the tremendous evidentiary record to set aside and to vacate the "Cease and Desist Order", the Court below considered but did not decide the point of jurisdiction, declaring it unnecessary to do so. (R. 16,816.)

The Government's Brief in this Court recognizes that the Commission's entire case stands or falls with this vitally important "preliminary question." (Gov't Brief, pp. 2, 29-30, 37-39, 63.) It is respectfully suggested that full consideration of the point will

lead to sustaining the order of the Court below to vacate the "Cease and Desist Order" without the necessity of going into the labyrinth designed by the Trade Commission to avoid this important issue.

Bias and Prejudgment.

The point that the respondents were deprived of the right of fair trial because of the Trade Commission's bias, prejudgment of the contested issues, and adverse interest in the outcome was raised first in this respondent's brief filed with the Trade Commission when evidence of the facts of bias was first discovered. Later as new discoveries were made the evidence contained in 23 documentary exhibits was assembled and these were by reference made a part of a formal Petition to Recuse the entire membership of the Commission. This Petition was taken under advisement by the Commission at the time of oral arguments and before the Commission had considered the evidentiary record. Fourteen months later, when the Commission issued its "Cease and Desist Order" it also, for the first time, issued a ruling on the "Petition to Recuse", denying the relief prayed and refusing to admit in evidence the 23 Marquette Exhibits upon which the Petition was based. The Court of Appeals ordered that the petition to review and to reverse this Order be briefed, argued and considered separately in advance of the proceedings to review and set aside the "Cease and Desist Order." The decision of the Court below on the point will be found in the Appendix hereto and reported at 147 F. (2d) 589.

Respondents Were Deprived of Important Procedural Rights.

The point of due process involving the deprivation of the respondents of the privileges and safeguards which are by law provided for the accused in statutory proceedings to restrain violations of Section 1 of the Sherman Act was touched upon in this respondent's brief and argument in the Court below but was not referred to in the opinion.

Trade Commission Proceeding Not in the Public Interest.

The point that the Trade Commission proceeding was and is contrary to the public interest was briefed and argued in the Court below but not passed upon or referred to in the opinion.

ARRANGEMENT OF THE BRIEF.

The points discussed herein do not involve the details of evidence relating to matters purely incidental to and in most instances unrelated to the alleged combination in restraint of trade which are the principal concern of the Solicitor General's brief. Therefore, we have not begun this brief with a statement of facts or undertaken to make any corrections or supply any deficiencies in the statement of the Petitioner.

In the first section we discuss the points of law covered in the brief with the supporting references to the Congressional Record and Statutes.

The second section consists of a brief discussion of a few pertinent cases and a list of others which it seemed unnecessary to discuss at length.

The third section* consisting of 53 pages is a gleaning of all the essential facts from the enormous record consisting of over 49,000 pages of transcript and an estimated 50,000 pages of exhibits, including the Trade Commission's Exhibit 2921, a book entitled, "The Masquerade of Monopoly," by one of the Commission's regularly employed economists and expert witnesses, Dr. Frank A. Fetter, which we did not abstract in our abbreviated statement of facts.

In the Appendix* will be found:

1. The Opinion of the Court below on the point of bias and prejudgment.

2. Descriptive list of the 23 Marquette Exhibits containing evidence of the Trade Commission's bias, predetermination of the contested issues and adverse interest.

3. Copy of the Complaint in a proceeding instituted by the Department of Justice against all of the respondents in the instant case which duplicates the charge of combination in restraint of trade set forth in the Trade Commission's Complaint, but characterizes the alleged offense as a violation of Section 1 of the Sherman Antitrust Act, instead of the labels used by the Trade Commission of violation of the Trade Commission Act and the Clayton Act. The Department of Justice Complaint makes substantially the same

* The Statement of Facts and the Appendix will be found in a separate volume, PART TWO, of this Brief.

allegations of facts as contained in the Complaint in the instant proceeding, and asks for a restraining order substantially the same as the "Cease and Desist Order" issued by the Commission in this proceeding. That equity case is now pending and approaching trial in the District Court of the United States for the District of Colorado at Denver and is referred to herein as the *Denver* case.

4. Reprint of a typical price quotation sheet of a steel manufacturer showing the manner in which base prices and basing-points are used, differing from the method in the cement industry of quoting "delivered prices" at various destinations.

5. Price quotation form used by respondent Marquette in 1937 for quoting delivered prices to its customers, received in evidence as Commission's Exhibit 3201E.

THE RESPONDENT'S POSITION.

The respondent, Marquette Cement Manufacturing Company, does not complain of the judgment vacating the restraining Order of the Federal Trade Commission. Marquette, like other respondents, was gratified that the Court below saw through the attempt to circumvent and to emasculate the decision of this Court in the "Old Cement Case" and realized that "the charge of combination is little more than a pretense to get all the members of the industry, leaders and followers alike,

into the same proceeding and before the same Court." (R. 16,769.)[1]

It is to the interest of the public that there be an end to litigation. It is not in the public interest that its great industries should be the victims of the wasteful and unauthorized efforts of any government administrative agency to widen the scope of its duties and its arbitrary powers. It is not in the public interest that the power to legislate entrusted to Congress and the jurisdiction invested in the Courts should be assumed by such an agency.

Therefore we now undertake to expose the effort of this administrative agency to take over the duties exclusively assigned to the Department of Justice and to usurp the jurisdiction invested in the Courts of the United States by Section 4 of the Sherman Act, and also to circumvent the refusal of Congress to include

[1] The testimony of Assistant General Counsel for the Trade Commission, Walter B. Wooden, before the Temporary National Economic Committee in January, 1940, urging legislation to outlaw the so-called basing-point system, disclosed the subterfuge of charging combination. Therein he said,

> "As the situation is now, with the outcome of any basing-point case depending upon the interpretation of the law and the facts under theories of conspiracy and concerted action which, I think, are necessary to make the law applicable, it requires an enormous expenditure of time, effort and labor in establishing that condition in an adversary proceeding for each particular industry * * *." (Part 27, p. 14,329, T.N.E.C. Reports, Jan., 1940.)

the Trade Commission's special definition of "true price" in the Robinson-Patman amendment to Section 2 of the Clayton Act—all by bureaucratic legislation for which this agency now seeks approval by judicial fiat. Thus the Commission would end the "crusade" which it began in 1936 to induce Congress to outlaw "delivered prices" which have been the established custom in the cement industry for nearly half a century.

ADDITIONAL REASONS FOR SUSTAINING JUDGMENT OF COURT BELOW.

The judgment of the Court below was correct, for all the reasons set forth in the Opinion of that Court. Nevertheless, Marquette, as it did below, urges that there are important additional reasons to sustain the judgment. Each of these is sufficient to sustain an order to vacate the Commission's "Cease and Desist" order, without the necessity of considering the evidentiary record.

These reasons are epitomized as follows:

(1) The Federal Trade Commission proceeding was outside of the Commission's statutory duties and jurisdiction. The entire Federal Trade Commission action was nothing more than an unwarrantable proceeding, in excess of the Commission's powers, to restrain an alleged violation of Section 1 of the Sherman Anti-trust Act.

(2) The Trade Commission was not qualified as an unbiased tribunal to try the contested issues. The Commission's refusal to recuse itself because of bias, prejudgment of the contested issues, and of direct interest in the predetermined outcome of the proceeding, as shown by the Petition and the twenty-three attached exhibits which the respondent presented to the Commission before consideration of the evidence and arguments, deprived the respondents of a fair trial.

(3) The proceeding was not tried in accordance with the applicable provisions of law. The Trade Commission proceeding was tried and determined in a manner contrary to the procedure provided by law for such Antitrust Act proceedings, and so as to deprive the respondents of lawful privileges and safeguards, among which are, the right to challenge the tribunal for bias or prejudgment of the issues which the Court below denied as not provided for in the Trade Commission Act, the presumption of innocence until proven guilty by a preponderance of evidence, a direct appeal to the Supreme Court of the United States, and a broader scope of review of the evidentiary record than that provided by the Trade Commission Act.

(4) The Trade Commission proceeding was and is contrary to the public interest.

Each of these several additional reasons for sustaining the order of the Court below involves a violation of the respondent's right of due process guaranteed by

the Fifth Amendment of the Constitution of the United States.

Severally and collectively, these additional reasons are sufficient in themselves to sustain the order of the Court below without the necessity of further considering the monstrous record.

THE QUESTION OF JURISDICTION.

The precise, primary, controlling question is:

> Does the Federal Trade Commission share with the Department of Justice the authority to institute proceedings to restrain a combination in violation of Section 1 of the Sherman Antitrust Act and, in connection with such a proceeding, is the Federal Trade Commission invested with jurisdiction to try the contested issues of fact and law involved therein and to issue a restraining order?

This point rests upon the premise that this is a Sherman Antitrust Act proceeding.[2]

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[2] This premise is supported by the Government's Brief as follows:

"QUESTIONS PRESENTED."

"(1) Whether a combination among respondents * * * having the effect and purpose of * * * eliminating price competition among themselves, is an unfair method of competition within the meaning of the Federal Trade Commission Act." (p. 2.)

"SUMMARY OF ARGUMENT.

"A. It is established that the prohibitions of the Federal Trade Commission Act apply to acts and prac-

THE TRUE NATURE OF THE TRADE COMMISSION PROCEEDING DETERMINED.

The true nature of the Trade Commission proceeding is not to be determined by the title of either of the two Counts of the Complaint or by the conclusion at the end of either Count.

The actual charge, as distinguished from titles and conclusions, is to be determined by the allegations in the Complaint; by the interpretation of the charge by counsel for the Commission as shown by the record; and especially by the final order of the Commission. Thereafter a complete understanding of the true nature of the proceedings can be achieved by careful study of the relevant statutes and their background, history and purposes.

---

tices which violate the Sherman Act, and that a combination among the members of an industry to eliminate price competition among themselves is a price fixing agreement illegal *per se* under the Sherman Act, and, further, that the Federal Trade Commission Act empowers the Commission to prohibit practices which operate to suppress competition." (pp. 29-30.)

"We take it to be almost axiomatic that the Sherman Act renders unlawful combination or agreement among members of an industry to eliminate price competition among themselves, * * *" (p. 39.)

"**Combination is thus the focal point of complaint, conclusion and order.**" (pp. 62-3.)

THE COMPLAINT.

COUNT I.

"The Charge Under the Federal Trade Commission Act."

"PARAGRAPH FOUR: For more than eight years last past, respondents have maintained and now have in effect a combination * * * to * * * restrain competition in price among producing respondents. (R. 48.)

* * * * *

"PARAGRAPH EIGHT: Effects of the Combination.

"The effect * * * is completely to destroy competition in price. (R. 185.)

"The said acts and practices constitute unfair methods of competition within the intent and meaning of the Federal Trade Commission Act." (R. 213.)

Count I, regardless of its title and regardless of its conclusion, clearly charges a combination in restraint of trade—a violation of Section 1 of the Sherman Antitrust Act.

COUNT II.

"The Charge Under the Clayton Act."

"PARAGRAPHS ONE TO FIVE, inclusive: As Paragraphs One to Five, inclusive, of Count II of this Complaint the Commission hereby incorporates Paragraphs One to Five, inclusive, of Count I to precisely the same extent as if each and all of them were set forth in full and repeated verbatim in this Count." (R. 218.)

"The acts * * * constitute unlawful discrimination in price within the intent and meaning of Section 2 of the Clayton Act as amended by the Robinson-Patman Act." (R. 249.)

Count II makes no allegations of fact in addition to those contained in paragraphs One to Five of Count I, which it adopts verbatim. The additional paragraphs Six, Seven, Eight and Nine consist of conclusions of law and arguments concerned therewith.

Count II is erroneously entitled "The Charge Under the Clayton Act." As Count II makes the same charge of combination in restraint of trade set forth in Paragraph Four of Count I, also alleging that such "discrimination in price * * * is the result of respondents'

combination,"[3] it is a Sherman Antitrust Act charge and not a Clayton Act charge at all.[4]

No separate order was issued under the supposedly separate charge of Count II. Section 2 of the Clayton Act, under which the Commission pretends to be acting, does not cover combination and conspiracy.

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[3] R. 241. This is also the Commission's own characterization of Count II. See Finding 24(a), R. 16,127.

[4] The charge of discrimination in price alleged to be the "result" of the combination charged, is not based upon the actual prices charged to and paid by the respondents' customers. The charge is based upon a definition of "true price" advocated by the Commission but rejected by the Congress in 1936. (*Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 736-7.) The action of the Commission in making up its own definition outside the statute is directly contrary to the rule of conduct laid down for the Commission by the Circuit Court of Appeals of the United States, 6th Circuit (Feb. 1939) in *Goodyear Tire and Rubber Company* v. *Federal Trade Commission*, 101 F. 2d 620, 625. This Court has heretofore recognized that "price" is the cost of the product delivered to the buyer at his destination; transportation is one of the seller's expenses. *Louisville & N. R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 269 U. S. 217, 237-8 (1925); *Wheeler Lumber Bridge & Supply Co.* v. *United States*, 281 U. S. 572, 578-9 (1930). As to the meaning of the term "price" to cement buyers and sellers, see PART TWO hereof, page 146 and pages 149-150.

THE ORDER.

The Commission's "Cease and Desist" Order does not comply with the requirements of Section 5 of the Trade Commission Act or Section 11 of the Clayton Act. It fails to require the respondent, Marquette, or any other respondent, "to cease and desist from using such method of competition," or individually from doing anything whatever, whether it be an "unfair method of competition" or a "discrimination in price."

This Order is nothing more than a restraining order such as the Department of Justice obtained in an equity proceeding under Section 4 of the Sherman Antitrust Act in the District Court of New York in the "Old Cement Case," entitled *U. S. A.* v. *Cement Manufacturers' Protective Association, et al.* (294 Fed. 390), which was reversed by this Court on June 1, 1925 (268 U. S. 588), and substantially the same as is sought in the Complaint by the Department of Justice in the pending proceeding instituted against The Cement Institute and its members pursuant to Section 4 of the Sherman Act in the District Court of Colorado, referred to as the "Denver Case." (Appendix page 207.)

The Commission's Order does not purport to restrain Marquette, or any other respondent, from violation of the Clayton Act. The Order is confined to re-

straining continuation of a "combination" or "conspiracy."[5]

Though not set forth in words as in the decree obtained by the Department of Justice in the "Old Cement Case," it is implicit in the Order:

"That nothing contained in this decree shall be

[5] The Petitioner's Brief admits at page 36 that:

"The Commission's order prohibits respondents from participating in any 'planned common course of action, understanding, agreement, combination, or conspiracy' to do certain specified things. It is only when there is a conjunction of such 'planned common course of action,' etc., and the doing of something against which the order runs that there can be a violation of its requirements."

And at pages 121-2:

"The order (R. 16,135) directs respondents, in connection with interstate sales of cement, to cease and desist from—

> entering into, continuing, cooperating in, or carrying out *any planned common course of action, understanding, agreement, combination, or conspiracy* between and among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, *to do or perform any of the following things*:

Then follow four numbered paragraphs, with subdivisions of paragraph 2 (R. 16,135-7).

"It is plain that under this order there is a violation of its provisions only in the event that there is a 'planned common course of action, understanding, agreement, combination, or conspiracy' to which a respondent is a party to do something specified in the numbered paragraphs of the order. This is an essential qualification of the prohibitions of these paragraphs."

construed as prohibiting any defendant from doing or performing any of the foregoing acts, or from selecting its own trade, or from disposing of its own product to such persons and on such terms as it may choose, if done individually and without combining, conspiring or agreeing with any other manufacturer of cement."

Clearly the so-called "Cease and Desist Order" is in fact a restraining order within the exclusive jurisdiction of a District Court of the United States pursuant to Section 4 of the Sherman Antitrust Act.

STATEMENTS OF COUNSEL FOR THE COMMISSION.

"The case is concerned wholly with the question of an alleged combination." (Statement of Trial Counsel for the Commission, Mr. Wooden, R. 12,129; Tr. 39,824-5.)

As we have seen, there has been no apparent doubt in the minds of counsel appearing for the Trade Commission during the progress of this case that it is exclusively a Sherman Antitrust Act proceeding. This was the official view of the Trade Commission when under the date of February 6, 1941, the Commission submitted its Monograph, "THE BASING POINT PROBLEM" to the Temporary National Economic Committee and it stated:

"The Cement case of the Commission is the first one **in antitrust enforcement** against a multiple

basing point system." (Marquette's Exhibit 23, p. xii.) (It is of interest to note that this official statement by the Commission was published during the pendency of the Commission's proceedings in the instant case and fifteen months before the respondents' arguments before the Commission.)

That the instant case was concerned with the authority assumed by the Trade Commission to restrain violations of the Sherman Antitrust Act was among the petitioner's "Reasons for Granting the Writ" of Certiorari.

> "The case is far removed from the usual proceeding under the Federal Trade Commission Act to stop a particular concern from using a trade name or trade practices believed to be misleading or otherwise unfair. The substantive issues are substantially those which arise in an equity proceeding by the United States to enforce the Sherman Act, which issues Congress has deemed to be of such importance that direct appeal should lie to this court." (Statement of the Solicitor General, Petition for Writs of Certiorari filed in this Court in the instant proceeding, pp. 16-17.)

STATUTES DISCUSSED HEREIN.

Sherman Antitrust Act.
(Approved July 2, 1890.)

"An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies."

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal." (26 Stat. 209; 15 U.S.C.A. Sec. 1.)

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations." (26 Stat. 209; 15 U.S.C.A. Sec. 4.)

"Federal Trade Commission Act".
(Approved September 26, 1914.)

"An Act to Create a Federal Trade Commission, to Define Its Powers and Duties, and for Other Purposes."

"Sec. 5. Unfair methods of competition in commerce are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, * * * or corporations, * * * from using unfair methods of competition in commerce.

"Whenever the Commission shall have reason to believe that any such person, * * * or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue * * * a complaint stating its charges in that respect, * * *."

"No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts."[16] (38 Stat. 719; 15 U.S.C.A., sec. 45.)

"Sec. 6. That the commission shall also have power—

* * * * * *

"(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the man-

[16] Restricted by definition in Section 4 of the Trade Commission Act to the Sherman Act, the Wilson Tariff Act, and Amendments to the Wilson Tariff Act. The Clayton Act was added to Section 4 in 1938. (38 Stat. 719; 52 Stat. 111; 15 U.S.C.A., sec. 44.)

ner in which the decree has been or is being carried out, and upon the application of the Attorney General, it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

"(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

"(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law." (38 Stat. 721; 15 U.S.C.A. sec. 46.)

* * * * * *

"Sec. 7. That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties

and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require." (38 Stat. 722; 15 U.S.C.A., sec. 47.)

* * * * *

"Sec. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts[7] * * * nor shall anything contained in the Act be construed to alter, modify, or repeal the said antitrust Acts * * * or any part or parts thereof." (38 Stat. 724; 15 U.S.C.A., sec. 51.)

Clayton Act.

(Approved October 15, 1914.)

"An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and for Other Purposes."

"Sec. 2 (a). That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities * * * where the effect of such discrimination may be substantially to lessen com-

[7] See footnote 6, page 20.

petition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination * * *." (As amended June 19, 1936, 49 Stat. 1526; 15 U.S.C.A. sec. 13.)

Export Trade Act.

(Also known as Webb-Pomerene Act—Approved Apr. 10, 1918.)

"An Act to Promote Export Trade, and for Other Purposes."

"Sec. 2. That nothing contained in the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July second, eighteen hundred and ninety, shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor for such association: *And provided further,* That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United

States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein." (40 Stat. 517; 15 U.S.C.A., sec. 62.)

"Sec. 4. That the prohibition against 'unfair methods of competition' and the remedies provided for enforcing said prohibition contained in the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes', approved September twenty-sixth, nineteen hundred and fourteen, shall be construed as extending to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States." (40 Stat. 517; 15 U.S.C.A., sec. 64.)

"Sec. 5.

* * * * *

"Whenever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally enhances or depresses prices within

the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein, it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustments of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper." (40 Stat. 517; 15 U.S.C.A., sec. 65.)

CONGRESSIONAL HISTORY OF THE FEDERAL TRADE COMMISSION ACT.

April 13, 1914, Congressman Covington introduced a bill to create a Trade Commission which was passed by the House on June 5th. In the Senate it was assigned to the Committee on Interstate Commerce. That Committee substituted a different Bill (which added the prohibition of "unfair methods of competition") which, after passage in the Senate, was sent to

conference. The leading advocates of the Bill were members of the Conference Committee which consisted of Senators Newlands, Pomerene, Saulsbury, Clapp and Cummins, and Messrs. Adamson, Symes, Covington, Stevens and Esh from the House. The Bill was signed by the President September 26, 1914.

The following pertinent excerpts from the Congressional Record show the Congressional intention to **exclude** the Federal Trade Commission from any power or duty to institute proceedings against, to try or to restrain, combinations in violation of Section 1 of the Sherman Antitrust Act, as the Commission did in the instant case.

Senate Report No. 597 of the Senate Committee on Interstate Commerce, headed by Senator Newlands (63rd Congress, 2nd Sess.) stated that the Commission would be:

> "of material **assistance** to the Department of Justice in the enforcement of the Sherman law, and of material aid to the business world in building up a body of precedent in the matter of business practices." (p. 10)

From the outset the Commission was assigned to a role of **assisting** in the enforcement of the Sherman Act. This was confirmed by various sponsors of the Act: (Unless otherwise noted, references made to the Congressional Record will be found in Volume LI. All emphasis is ours.)

> "Mr. Newlands. This bill does not interfere with the Attorney General in the administration of the

antitrust law. There has been a great indisposition to change in any way the Sherman antitrust law, in which the country has confidence, or to change the agency through which that law is to be administered, so that this bill leaves the powers of the Attorney General as complete as ever with reference to the enforcement of the antitrust law. * * * (p. 11,083.)

"Mr. Borah: Let me ask the Senator another question. Section 5 says:

> 'That unfair competition in interstate commerce is hereby declared unlawful. The Commission is hereby empowered and directed to prevent corporations from using unfair methods of competition in commerce.'

"The whole covers every subdivision of the whole, and anything which would result in unfair competition in combinations, holding stocks of corporations, interlocking directorates and every conceivable industrial condition which would result in unfair competition; would be subject to the investigation of this Commission.

"Mr. Cummins: It might be subject to the **investigation** of the Commission, but it is not subject to the **correction** of the Commission, and that is the main thing. **I do not believe, Mr. President, that unfair competition is the synonym of no competition or of imperfect and inadequate competition.** (p. 11,104.)

"Mr. Robinson: The term 'unfair competition'

has a more or less fixed meaning in law. * * * (p. 11,107)

"Mr. Newlands: I was curious to know how many unfair practices there were that were generally recognized and I found these:" (p. 11,108)

As we are not engaged in discovering and listing the innumerable schemes and devices which have been, and which may hereafter be, included in the term "unfair methods of competition," the discussions on this subject are not pertinent. Our purpose is limited to showing that it was the intent of the Congress to prevent the Trade Commission from trespassing upon the duty assigned to the District Attorneys of the United States to institute all proceedings to restrain violations of the Sherman Antitrust Act, and also to prevent usurpation by the Trade Commission of the jurisdiction, exclusively invested in the courts of the United States, to try the contested issues in such proceedings and to issue restraining orders in connection therewith.

Here are further pertinent excerpts from the Congressional Record:

"Mr. Cummins: Mr. President, during the course of the debate fears have been expressed that the prohibition contained in this Bill against unfair competition and the interposition of the Commission with its jurisdiction in working out and making effective that prohibition would in some way impair the strength of the Antitrust

law, and would permit offendors against the Anti-trust law to appeal to the Commission for some kind of immunity for offenses committed against that statute."

"This view, Mr. President, arises from a total misapprehension of the bill. **The antitrust law is not touched by the bill under consideration. It is not amended in any way.** The offenses under it remain the same. **All the remedies for a violation of the antitrust law continue without any modification whatsoever.**"

"In order to make this perfectly clear, although I think it is unnecessary, yet in order to quiet any possible apprehension with regard to this subject, I intend to offer an amendment to section 5. * * *" (p. 11,528)

He then proposed an amendment to section 5, as follows:

"Provided that no order or finding of the court or commission in the enforcement of this section shall have any force or effect or be admissible as evidence in any suit, civil or criminal, brought under the antitrust act, nor shall anything contained in this act be construed to alter, modify or repeal the said antitrust act, or any part or parts thereof. (p. 11,528)

"Mr. Cummins. Mr. President, I repeat that the entire argument based upon the hypothesis that we have attempted in any wise to interfere with the antitrust law is without basis. * * * It is

not surprising that now and then an offender under the antitrust law escapes the attention of the Attorney General of the United States and of his assistants."

"What we propose to do here is not to arrest the enforcement of the antitrust law, not to weaken its remedies, not to allow any criminal under its provisions to escape, but to **add** to the Department of Justice an **investigating** tribunal of high character, of great experience, well equipped to bring to the attention of the Attorney General those instances which may have escaped the inquiries carried on in that department, and thus secure **through the Department of Justice** a more efficient enforcement of that law.

"But we propose to do one thing more. * * * **We propose to make it unlawful for any corporation**, or any person, indeed, **to practice unfair competition, and wherever the practice of unfair competition has not reached a point that constitutes a violation of the antitrust law,** then we intend to do what we can to maintain fair, full, free competition through the intervention of the trade commission." (p. 11,529)

* * * "I think it should be clothed with adequate power of investigation. I think that it should be free to prosecute an investigation whenever it believes that it would serve the public welfare to do so, and if in the course of the investigation a violation of the antitrust law or any other law

of the United States relating to this subject is developed, I think it ought to report the result of its investigation to the Attorney General, whose duty it is to prosecute offenders; * * *" (p. 11,530)

"As I have already explained with regard to an amendment which I have offered to section 5, this proviso is intended to **leave the antitrust law in all its strength and vigor. It is intended to leave all its provisions untouched. It is intended to leave its administration in the hands to which it is now committed;** * * * I think the American people now demand, and this **Congress is ready to give to the people, this further relief against the incipient stages of the war to preserve competition, so that we may prevent in the very beginning those relations which will finally lead these corporations into conflict with the antitrust law.**" (p. 11,532.)

"Mr. Cummins. **The Senator must not forget that he still has the antitrust law with all its penalties, with all its criminal provisions, under which men who do restrain trade and commerce can be convicted, can be fined, and the fines may accumulate in a very large amount. I am not trying to impair that law; I am trying to add something that will take a lesser violation of the law of competition, a condition that if permitted to exist will finally eventuate in a restraint of trade or commerce.**" (p. 11,533.)

"Mr. Hollis: * * * The Department of Justice, with its manifold other activities, has not in the

past brought suit under the Sherman Act, and probably will not do so, except in cases of great magnitude involving what appear to be very clear violations of the act. In such suits the Attorney General usually alleges the use of unfair competitive practices in support of his main contention that a monopoly exists which ought to be dissolved. The injunction against the future use of such practices is only an incidental part of the decree." (p. 12,146.)

* * * * *

"Mr. Thomas: Mr. President, if it does not interrupt the trend of the Senator's discussion, I think it is appropriate to call his attention to one of two proposed amendments to the pending bill which were offered just before we recessed yesterday by the Senator from Nevada (Mr. Newlands), having charge of the bill.

"The first is a proposed addition to section 5. * * *

* * * * *

"It may be that in the given instance the John Smith corporation, accused of practicing unfair methods of competition, will be haled before this commission, and the commission will decide that the practice is fair in some respects and unfair in others. There will be a court review of that decision and it will be affirmed, but perhaps the next week or the next year an indictment may be brought against that corporation * * * for a violation of the antitrust act, * * *

* * * * *

"* * *. We are going to provide a system, a method for the intelligent transaction of business conducted without unfair methods of competition, but at the same time we are going to provide that if a proceeding is instituted against a person so doing, charged with the violation of some other statute, the thing which is done here, instead of being a protection, is going to be no defense at all. In other words, we are going to compel business men to come before this commission, tell them what they can do, and then, if under some other law they are to be punished, they cannot seek protection or obtain any sort of consideration by virtue of their compliance with the statute we propose to enact. (p. 12,622.)

* * * * *

"Mr. Cummins. * * * **If 'unfair competition' were identical with 'restraint of trade or commerce,' the criticism of the Senator from Colorado would be unanswerable; but here are two radically different offenses. It is not supplemental to the antitrust law in so far as section 5 is concerned. It is intended to accomplish the same great object, but it is not supplemental to it in the sense that it is another attempt to enforce the antitrust law.**

"**The antitrust law denounces restraint of trade** or commerce and denounces monopoly. * * * **Section 5 of this bill denounces unfair competition.** In a trial as to the existence of unfair competition the issue is not the same as in a trial upon the

issue of restraint of trade or commerce. **There may be unfair competition in a restraint of trade, and there may be proof of unfair competition in a suit brought to establish restraint of trade; but the mere fact that there has been or exists unfair competition does not establish restraint of trade or commerce. Therefore, as it seems to me, the prosecutions under the two statutes ought to be entirely separate and distinct.**

"I think that is the reason for this amendment. (p. 12,623.)

* * * * *

"Mr. Thomas. * * * I should like to ask what office this proviso can perform. What is the use of it? (p. 12,623.)

"Mr. Cummins. There is none, except to allay an unfounded criticism of the bill. **It is already charged here that the purpose of this bill is to destroy the effectiveness and prevent the enforcement of the antitrust law.** Inasmuch **as it was the purpose of the author of the bill, and I am sure the purpose also of those members of the committee who favored the bill, that the antitrust law, presenting an entirely different issue, should remain untouched, unimpaired, and unembarrassed in its enforcement,** therefore **this amendment is proposed,** * * *

"I quite agree with the Senator from Colorado that **inasmuch as the issues are different, and the inquiry therefore occupies a different field,** the

order would not be admissible anyhow; but I think **it was the purpose of the committee to assure the people of the United States that in creating the additional offense against trade—namely, unfair competition in and of itself—we were not in any way interfering with the enforcement of the statute of 1890.** (p. 12,623.)

* * * * *

"Mr. Newlands. The amendment which I have offered as a proviso to section 5 has been under criticism. That amendment, taken in connection with **another amendment** adding a new section to the bill, (which is **Section 11 of the Trade Commission Act) absolutely prevents this measure from having any effect whatever upon the antitrust law or its enforcement.** The reason why I offered this proviso and the additional section was that the Senator from Iowa (Mr. Cummins) had offered an amendment which covered the ground of both, and I thought it more logical to divide it into these two parts.

"I wish to say that individually I have always been in favor of taking away the administration of the Sherman antitrust law from the Attorney General's office and vesting it in a commission such as this is. * * *

* * * * *

"At the same time, whilst I have desired to accomplish this * * * I realize that the public mind favors and sustains the continuance of the Sherman antitrust law. * * * I realize also that an at-

tempt to disassociate the Attorney General's office from the administration of the law itself would be regarded as an act inimical to the law itself. **Public opinion has not yet reached the point where we can secure the safe, continuous, persistent, and consistent administration of the Sherman antitrust law through a commission.**

"We faced the fact then that we could not give this commission jurisdiction and control over the administration of the antitrust law, but we could make it efficient in aid of the court and of the Attorney General. We have done that, and we have concluded to go further and to reach practices which, whilst perhaps they might be incidentally reached through the administration of the Sherman antitrust law, **could not** always be reached. These practices constitute the very germ of monopolies. They are the monopolies in embryo. **In order to pass this bill it was necessary to give absolute assurance that the antitrust law itself would not be interfered with, and it was with that view that I assented to this amendment."** (p. 12,623.)

"Mr. Cummins. * * *

"* * * yet inasmuch as we have a statute which is directed against the restraint of trade as forcibly and as completely as any statute could be directed against an evil—a statute which is directed against monopoly and all attempts to monopolize as emphatically as a statute could be

directed toward such purposes—and inasmuch as that statute is to remain unimpaired, untouched, with all its vigor, and we now propose to make a new offense which is intended to prevent unfair competition, I cannot quite understand how the Senator from Massachusetts can characterize a bill of that kind as a proposition to regulate monopoly." (p. 12,733.)

* * * * *

"Mr. Newlands. * * *

"This commission is organized for the enforcement of the Sherman antitrust law by aiding the courts in the preparation of decrees and in the dissolution of these trusts; by aiding the Attorney General in his work in enforcing the antitrust law, by investigations under which **it is the duty of the commission to call the attention of the Attorney General to any violation of the antitrust law with a view to securing his action as to its enforcement** and a further provision contained in section 5 which takes hold of unfair practices in competition that tend toward the creation of monopoly by the destruction of fair competition.

"It will be seen, therefore, that **this is not a substitute for the antitrust law** but is in aid of the enforcement of the antitrust law and is intended to take hold of those practices in trade which inevitably in the end **lead** toward the creation of a monopoly and the increase of monopolistic power. (p. 12,734.)

"Mr. President, the powers of this commission are to be in aid of existing law—first, in aid of the courts; second, in aid of the Attorney General; third, in independent investigations which will bring to sight violations of the law, the obligation being imposed upon the commission of bringing those violations to the attention of the Attorney General.

"The only other extra matter of jurisdiction that is imposed upon this commission is to ascertain whether unfair practices exist and to condemn them. (p. 12,747.) * * *

* * * * *

"There is a disposition to prevent the commission from taking the place of the Attorney General's office in the enforcement of the law, and to that I yielded. (p. 12,787.)

"Mr. Sutherland: The answer of the Senator from Nevada can hardly be described as a categorical answer to the question which I put.[8]

"If exactly the same question should be presented—I am not saying that it would be, but if exactly the same question that was presented in

[8] The specific question asked was as follows:

"Mr. Sutherland: Mr. President, I should like to ask the author of the amendment whether in a case regularly prosecuted in the court, in which final judgment was rendered by the court in favor of the defendant, his proposed amendment would preclude the pleading and use of that judgment in evidence as an estoppel in a subsequent case brought upon the same facts?" (p. 12,787.)

the first proceeding before the court should be presented in the subsequent suit—does the Senator understand that this amendment would preclude the use by the defendant of the finding or judgment of the court in the first suit as an estoppel to the proceeding in the second suit, covering identically the same question? Does the Senator from Nevada think that would follow? (p. 12,787).

"Mr. Cummins. My first observation is that **it is impossible that the case suggested by the Senator from Utah should arise.** A prosecution under the antitrust law charges either a restraint of trade, a monopoly, or an attempt to monopolize. The prosecution must involve one or the other of those charges; and the issue presented to the court: Is the defendant guilty of a restraint of trade, guilty of an attempt to monopolize, or guilty of maintaining a monopoly? A suit under section 5 must necessarily charge unfair competition,* and the action of the commission and the action of the court would be no more than to find either that the defendant had been guilty of unfair competition or had not been guilty of unfair competition.

* * * * * *

*To make such a charge requires the allegation of the essential facts. A mere title as a head, and a conclusion of law for feet, with no essential facts to constitute the body of the charge of using "unfair methods of competition" is not sufficient. Such a charge lacks "vitals."

"* * * the attempt is to keep the prosecution in the two cases entirely separate and distinct. (p. 12,787)

* * * * *

"The amendment being discussed was agreed to." (see page 12,804)

Specific Provision to Prevent Overlapping of Duties of Trade Commission and the Department of Justice.

Discussion was then resumed of the further amendment intended to avoid the possibility of duplication of the duties of the Trade Commission and the Department of Justice in relation to the Sherman Antitrust Act. This amendment, which became Section 11 of the Act, was as follows:

"That nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust acts or the acts to regulate commerce or any part or parts thereof."

Senator Newlands said:

"It is simply for the purpose of absolutely insuring the fact that this bill does not in any way affect or interfere with the enforcement of the antitrust laws." (p. 12,986)

* * * * *

"Mr. Chilton. The Senator recognizes, does he not, that both the trade commission bill and the Clayton bill proceed upon the theory, expressed

in both of them now, that no part of the Sherman law shall be amended or modified by anything contained in either or both of them?"

"Mr. Cummins. I think so. (p. 12,988)

* * * * *

"Mr. Cummins. **I want**—and it has been my insistence from the beginning—**to leave the antitrust law untouched in all its vigor, so that every offense which it prescribes can be prosecuted hereafter just as it has been prosecuted heretofore** (p. 13,153)

* * * * *

"Mr. Kenyon. I doubt if any one of these acts would have been held sufficient to have established restraint of trade. That, it seems to me, is the difference between the Sherman Act and the present act. This can take hold of matters that are not in themselves sufficient to amount to a monopoly or to amount to restraint of trade." (p. 13,156)

* * * * *

"I would not vote for the bill if I believed that it did injure the Sherman Act or lessen its power. I shall cheerfully vote for this bill, and shall cherish the hope that the power of this commission in the future will be enlarged to deal with industrial conditions, with unfairness between employer and employee. If this act shall do even a little to help in stopping monopoly in this country by getting at the unfair practices before they have fully ripened and blossomed, then it will do

good and it will justify the long time that has been taken in its discussion. (p. 13,160)

* * * * *

"Mr. Clapp. * * * I think we all realize that under the Sherman antitrust law, designed, as it was, primarily to reach combinations, conspiracies, and agreements, those acts which amount to unfair competition, but which are dissociated from efforts involving the plan of conspiracy would not be reached by the Sherman antitrust law." (p. 13,301.)

The following amendment was proposed by Mr. Reed at page 13,310 but rejected at page 13,314:

"Sec. 6. The term 'unfair competition' is hereby defined to embrace all those acts, devices, concealments, threats, coercions, deceits, frauds, discriminations, dishonest practices, false representations, slanders of business, and all other acts or devices, whether of like nature with those herein enumerated or not, done or used with the intent or the effect of which is to destroy or unreasonably hinder the business of another or prevent another from engaging in business, or to restrain trade or to create a monoply." (p. 13,310)

The discussion is illuminating:

"Mr. Cummins. I come immediately to the latter. The words 'or to restrain trade or create a monopoly' are entirely surplusage. They ought

not to be here at all. **Any acts, whether deceitful or fraudulent or dishonest or false, if done in the way of a restraint of trade or in the way of creating a monopoly, are now denounced and prohibited by the antitrust law.** You have included in this amendment the intent to restrain trade and the intent to create a monopoly in order to make the acts which you have described unlawful under the law." (p. 13,311.)

* * * * *

"Mr. Walsh. The Senator has not appreciated the idea, I think, that I am endeavoring to convey to him. I convey to him the idea that **any of these things done with the intent to create a monopoly are already offenses under the Sherman Antitrust Act and should be left to be dealt with under the Sherman Antitrust Act. We are endeavoring in this act to reach cases and instances that are not there dealt with.**" (p. 13,312.)

WORK OF THE CONFERENCE COMMITTEE.

It appears from the Report of the Conference Committee (Conference Report No. 1142, 63rd Cong., 2nd Sess., Sept. 4, 1914) that Section 11, as added on the floor of the Senate, was carried into the Conference Bill, and Senate Amendments to section 5 were simplified to read:

"No order of the commission or judgment of the court to enforce the same shall in any wise relieve

or absolve any person, partnership, or corporation from any liability under the antitrust acts." (Conference Report p. 5)

Both bills had contained provisions for investigation by the Commission and report to the Attorney General on alleged violations of the Antitrust Acts. The Senate bill in Section 3(g) had provided for the Commission to report its findings on **violation** of the Antitrust Acts but Section 10 of the House bill had confined the Commission to a report of the **facts** and recommendations for readjustment by the corporation investigated. These investigations were to be in both instances at the direction of the President, Attorney General, or either House of Congress, with the Senate version adding "upon its own initiative." These provisions of the two bills as they came out of conference, appear in Section 6 as follows:

"(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

"(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law." (Conference Report p. 6)

The Conference Report explains this as follows:

> "The Commission is required to make the investigations relating to alleged violations of the antitrust acts as provided in section 10 of the House bill, except that the expression 'direction of the Attorney General' is eliminated. He is the head of an executive department and the direction of the President is deemed sufficient. The reports of such investigations do not include, at the discretion of the commission, recommendations for readjustments of business, so that the corporations investigated may operate lawfully, but a new subsection is added, section 6, paragraph (e), requiring the commission to make recommendations of this character on the application of the Attorney General." (p. 18.)

The Conference Report further shows the limited purpose of the phrase "unfair methods of competition":

> "The most certain way to stop monopoly at the threshold is to prevent unfair competition. This can be best accomplished through the action of an administrative body of practical men thoroughly informed in regard to business, who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations.
>
> "It is impossible to frame definitions which embrace all unfair practices. There is no limit to

human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case." (p. 19.)

PROCEEDINGS IN THE HOUSE ON THE CONFERENCE REPORT.

Congressman Covington (Chairman of the House Committee on Interstate and Foreign Commerce, and a manager on the part of the House on the Conference Committee) reported to the House as follows:

"The commission is required to make the investigations relating to alleged violations of the antitrust acts as provided in section 10 of the House bill. The original Senate provision of a similar character authorized the commission to go further than to make a report on the facts to the Department of Justice. It provided for a report of the findings of the commission with respect to violations of the law. The purpose of the original House provision was to give some

compulsory process whereby the Department of Justice, before bringing suit under the antitrust acts, can obtain all the information necessary to determine whether the law has been violated or not, and for the proper statement of the case of the Government in its bill of complaint if there has been a violation. On the other hand, **everyone recognizes that it would be a mistake to divide the authority of enforcement of the antitrust acts between any other body and the Department of Justice. The Attorney General should be left in full control, as the chief law officer of the Government, of the disposition of cases arising under the Sherman law.** He would not be thus left if there were embodied in the report of facts made by the trade commission with respect to any investigations conducted by it concerning violations of the Sherman law, findings, that is to say, conclusions of law, respecting violations. The House therefore insisted upon retaining its original language, which has been thought out after consultation with many lawyers actively concerned in the prosecution of trust cases for the Government." (p. 14,926.)

* * * * *

"We are seeking here not to enter into any unknown or speculative realm of the law but to deal, as we ought to deal, with those practices of unfair trade in their incipient stages which if left untrammeled and uncontrolled become the

acts which constitute in their culmination restraint of trade and monopoly * * *." (p. 14,929.)

"The term, 'unfair competition' or 'unfair methods of competition' has a sufficiently definite meaning in law to be enforced when constituting the prohibition of a statute. And while most of the earlier cases related to the infringement of trade marks, the term may be said now to embrace those unjust, dishonest and inequitable practices by which one seeks to destroy or injure the business of a competitor." (p. 14,929.)

Here Mr. Covington made a lengthy analysis of works on unfair competition and court decisions relating thereto. This analysis is not germane to the present inquiry since we are not here engaged in listing all the various things that might be included, but, on the contrary, are engaged only in demonstrating that the term "unfair methods of competition" did not include "a combination to restrain competition in price."

* * * * * *

"Mr. Madden. Do the conferees understand, and wish to have the House understand, that this does away with the Sherman law?

* * * * * *

"Mr. Talcott. **It takes care of the tendencies toward violation of the Sherman law—acts which the Sherman law can not treat of.**

"Mr. Stevens of Minnesota. **The gentleman is accurate, as he always is, and states exactly the**

purpose of this bill; and I will come to that when I reach section 5—the judicial part of this bill. (p. 14,934.)

* * * * * *

"Mr. Stevens of New Hampshire. * * * Secondly, it will give to the Department of Justice in the enforcement of the antitrust law the benefit of its investigations and its more expert knowledge of business conditions. Last, and to my mind the most important one, it will give to this commission the power of preventing in their conception and in their beginning some of these unfair processes in competition which have been the chief sources of monopoly. That part of the bill is practically new, and yet it has grown out of experience with other legislation. In the enforcement of the Sherman antitrust law it has been disclosed in practically every case which the Government has brought against the big combinations, the Standard Oil case, the Tobacco case, the Thread case, the Bathtub case, that the chief means of destroying competition by big combinations was by the use of methods which were distinctly unfair and oppressive. **Those combinations can be dealt with by the Federal courts in the enforcement of the Sherman antitrust law.** They can be dissolved, and in practically every recent case the Federal courts have added to the writ of dissolution specific injunctions against the use in the future of those methods which have

been used in that particular business. **What we wish to do and ought to do above everything else is to prevent the growth of monopoly at the beginnning.**" (p. 14,941.)

There is more strong evidence of the intent of the Congress to prevent the Trade Commission from going beyond the duties prescribed for it in the Act—to investigate, report and aid the Department of Justice and the Courts in the administration of the Sherman Antitrust Act—that will later appear interspersed with the Congressional record of discussions which preceded passage of the Clayton Act.

ACTIONS OF CONGRESS CONTEMPORANEOUS WITH THE FEDERAL TRADE COMMISSION ACT.

Actions of Congress contemporaneous with the consideration of the Trade Commission Act confirm the intention of Congress that the Trade Commission was not to have concurrent authority with the Department of Justice and not the same jurisdiction as the Federal Courts to restrain violation of the Sherman Antitrust Act. References to the Trade Commission Act are interspersed with discussions relating to the Clayton Act as the two measures were before Congress at the same period.

The Clayton Act.

Some weeks after the final passage of the Trade Commission Act, the Congress enacted the Clayton Act. There is a wide difference between the two Acts. This is first indicated by the titles.

The Clayton Act is entitled:

> "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes."

It is an antitrust act, as specifically stated in Section 1. (38 Stat. 730; 15 U.S.C.A. Sec. 12.) Compare Section 1 of the Clayton Act with Section 4 of the Federal Trade Commission Act, and note the contrast.

History of the Clayton Act.

Some of the discussion of the Clayton Act occurred prior to the final agreement upon the conference report on the Trade Commission Act, and therefore bears upon and explains both acts.

> "Mr. Shields. * * * (speaking of the Trade Commission Act)
>
> **"The jurisdiction of the commission is confined to 'unfair competition' between dealers.** It is merely a school of good manners for competitive dealers. **It has no power to restrain or prohibit restraints of trade and monopolies** prejudicial to consumers and the general public; **this was conceded in the discussion of the bill in this Chamber."** (p. 14,213.)

"Mr. Cummins. * * * The purpose of section 5 in the trade commission bill is to bring about a cessation of unfair competition in the beginning before it ripens into monopoly." (p. 14,251.)

"Mr. President, I beg the attention of the Senate a moment to sections 8 and 9. (This refers to the Clayton Act, Secs. 7 and 8.) I think no one contends that the things here sought to be prohibited are examples of unfair competition; I think that no one ought to insist that legislation upon those subjects should be remitted to the unfair-competition section of the trade commission bill. Interlocking directors and the holding of the stock of one corporation by a rival do not constitute unfair competition; they constitute the suppression of competition, or at least furnish a motive for the failure of two or more corporations to compete with each other, although they may be engaged in the same business. * * *" (p. 14,254.)

"Mr. Walsh. * * * That argument was made when the trade-commission bill was here for consideration, but I do not recall that even the Senator from Missouri, who, as everybody knows, was exceedingly pronounced in his opposition to section 5, said to the country that we had emasculated the Sherman Antitrust Act by creating the trade commission. (p. 14,266.)

"Mr. President, it is not my purpose now to endeavor to repeat the absolute demonstration that was made in the course of that debate, that

the Sherman Act is left in all its virility applicable to every case to which it has been made applicable in the past or may be by construction made applicable in the future. It was recognized, however, that there were many practices indulged in by business organizations that had not progressed so far in the suppression of competition as to constitute a monopoly, nor so far in the process of combination as to come within the denunciation of the provisions of section 1 of the Sherman Antitrust Act. The trade-commission bill was intended to deal with cases of that character, cases that could not be reached by the Sherman Act. But, Mr. President, in speaking about this matter on yesterday the Senator from Missouri discussed the provisions of sections 2 and 4 (of the Clayton Act) as though the trade commission, under the provisions of those sections, were going to deal with the occurrences that absolutely constitute the establishment of a combination in restraint of trade or an outrageous monopoly. Those provisions will be taken care of. Why, Mr. President, the Senator went for all his illustrations to cases determined by the Supreme Court of the United States and the other courts, to be monopolies or combinations denounced by the Sherman Act. Those things will all be open to prosecution under the Sherman Antitrust Act just exactly the same as before. (p. 14,267.)

"Mr. Walsh.[10] * * * We have given to this Congress, and to the country that is awaiting the passage of this bill, the most solemn assurance over and over again that these remedies are not cumulative to those already provided by the law for violations of the Sherman antitrust law."

"When we had the trade commission bill under consideration we were accused time and time again of giving an alternate remedy to the Government in relation to violations of the Sherman antitrust law, and over and over again the assurance was given from this floor that nothing of the kind was contemplated by that legislation at all.

"It was said that the Attorney General would have a choice, under the law, whether he should proceed to enforce the Sherman antitrust law in accordance with its original provisions or whether he should hale offenders against that law before the trade commission for the purpose of punishing them as therein provided. We told the Senate again and again that that was not the purpose, that the two were intended to cover practices that were essentially different." (p. 14,460.)

As we have seen, the Congressional history and background of the Federal Trade Commission Act (approved September 26, 1914) and the Clayton Act (approved October 15, 1914) were closely interwoven.

[10] This occurred on August 31, 1914, prior to approval by the Senate of the Conference Report on the Federal Trade Commission Act on September 8, 1914.

Wherefore, with the enactment of the Clayton Act the background and contemporaneous history of the Trade Commission Act comes to a close. The record contains ample and indisputable proof that the framers, proponents, and managers of the Trade Commission Act in both houses of Congress intended that the Trade Commission Act should not be construed to permit the Trade Commission to infringe upon the duties assigned to the Department of Justice nor to usurp the jurisdiction of the Circuit Courts of the United States established by Section 4 of the Sherman Antitrust Act.

Before passing on to the next subject, it is relevant to note that by Section 11 of the Clayton Act a right to prevent and restrain violations, limited to certain classes of enterprises, was granted to the Federal Trade Commission, and that the power granted to the Department of Justice and to the Courts by Section 4 of the Sherman Act is repeated in Section 15 of the Clayton Act. Thus it is evident that the same committees and members of Congress that created both Acts well understood how to set forth in plain, understandable words a specific assignment of duty or grant of jurisdiction. If it was intended to give the Trade Commission power to institute proceedings to restrain violations of Section 1 of the Sherman Antitrust Act and to exercise jurisdiction to try the contested issues in such a proceeding and to issue orders enjoining combinations in restrain of trade, Congress could and would have said so in plain words.

THE LETTER OF THE FEDERAL TRADE COMMISSION ACT.

Let us now look at the finished product, the Act itself. The title of the Act must serve for an indication of its intended nature. Unlike the later Acts of Congress, it contains no "declaration of policy." It is entitled, "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

It is not an "Antitrust Act." The term, "Antitrust Acts," is defined in Section 4 of the Trade Commission Act to include only the Sherman Act, the Wilson Tariff Act and Amendment to the Wilson Tariff Act. (38 Stat. 719; 15 U.S.C.A. Sec. 44.) The 1938 Amendment added the Clayton Act. (52 Stat. 111.)

As the title provides, the Act itself confers and limits the powers and the duties of the Commission. The Commission has no duties and has no powers except insofar as they are derived from the Act of Congress under which it was created and exists or from subsequent acts of Congress. Without radical amendment of the Constitution, the Commission can derive no authority from the Courts.

The Trade Commission Act confers no express power on the Commission to enforce the Sherman Act. In view of the provisions of the Trade Commission Act, its purpose and its history, no such power can be implied.

Long prior to the consideration of the Trade Commission bill, this Court held with respect to the Sherman Act, "Congress has prescribed a specific mode" for preventing restraints upon it (commerce);—namely, suits in equity under the direction of the Attorney General." The further statement in that decision is equally applicable to the present case, "Of the present suit the Attorney General has no control, and is without any responsibility for the manner in which it is conducted, although, in its essential features, it is just such a suit as would be brought by his direction when proceeding under the 4th section of the antitrust act."[12] Any deviation from this pattern for enforcement of the Sherman Act requires definite subsequent legislation which is entirely absent from the Trade Commission Act.

The Act, as the title promises, specifically defines the powers and duties of the Commission and also nicely limits the Commission's duties in relation to the antitrust laws. These powers and duties are limited

[11] "Section 4: The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several District Attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *" (15 U.S.C.A. Sec. 4.)

[12] *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, at p. 71 (1904). *C. f. Botany Worsted Mills* v. *United States*, 278 U. S. 282, 288-9: "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

to investigations and recommendations. The principle of the ancient but still respected maxim, **"Expressio unius est exclusio alterius,"** is controlling.

Congress was not satisfied to rely upon any principle of statutory construction. The Sherman Act and its enforcement by the Attorney General were sacred. It was all right to permit the new administrative tribunal to help the Attorney General and the Courts, but Congress and the public would not accept any act which in any way tampered with the exclusive conduct of Sherman Act proceedings by the Attorney General. To guarantee against any usurpation of that function by the Commission, the original draft of the Trade Commission Act was amended in two respects.

The first was an amendment to section 5 as follows:

> "No order of the Commission or judgment of court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts." (15 U.S.C.A. Sec. 45.)

This was offered by Senator Cummins, "To make clear" that "all remedies for a violation of the antitrust law continue without any modification whatever." (Congressional Record, Vol. LI, p. 11,528.)

The second amendment added Section 11 as follows:

> "Sec. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust

Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof." (38 Stat. 724; 15 U.S.C.A. sec. 51.)

This was offered and characterized by Senator Newlands as

"Simply for the purpose of absolutely insuring the fact that this bill does not in any way affect or interfere with the enforcement of antitrust laws." (Congressional Record, Vol. LI, p. 12,986.)

Section 11 might well be paraphrased to apply to the instant case as follows:

"The term 'unfair methods of competition,' contained in this Act, shall not be construed to mean 'combination * * * in restraint of trade' nor shall this term be construed so as to permit the Federal Trade Commission to infringe upon the duties of the Department of Justice or the jurisdiction of the Federal Courts to prevent and restrain violations of the Sherman Antitrust Act, as provided in Section 4 thereof."

Congress thus also guarded against any "judicial legislation" construing "unfair methods of competition" to mean or include anything Congress had already specifically covered in the Sherman Act.

The purpose of Congress in adding Section 11 to

the Federal Trade Commission Act has already been recognized by this Honorable Court. This section was cited in *Thatcher Manufacturing Co.* v. *Federal Trade Commission*, 272 U. S. 554, at page 561, in holding that the Commission had no jurisdiction even though the facts might constitute a violation of the Sherman Act.

> "* * * If purchase of property has produced an unlawful status a remedy is provided through the Courts. Sherman Act, 26 Stat. at L. 209. Act to Create a Federal Trade Commission, § 11, 38 Stat. at L. 717, 724. * * * The Commission is without authority under such circumstances."

SUBSEQUENT ACTS OF CONGRESS.

"Webb-Pomerene" or "Export Trade Act".

(40 Stat. 516; 15 U.S.C.A., Sec. 61-65, approved Apr. 10, 1918.)

Two years later (1916) the Congress had before it a new bill which was known as the Webb-Pomerene Bill. This bill proposed that associations of corporations to compete with foreign cartels be freed from the prohibitions of the Sherman Antitrust Act. It also extended the administrative duties of the Trade Commission.

Analysis of this bill, in its formative stages, by its proponents as found in the Congressional record, subsequent interpretations by the Trade Commission

and its recent construction by this Court, will discover further evidence that the Trade Commission had no duty or power which parallels or duplicates the duty of the Attorney General and the jurisdiction of the District Courts of the United States to prevent and restrain violations of section 1 of the Sherman Act.

Report of Senate Interstate Commerce Committee to Promote Export Trade, H. R. 17350, Sixty-fourth Congress, Second Session, Senate Report 1056:

"Mr. Pomerene[13] for the Committee states:

"Section 4 of the Bill aims to prevent 'unfair methods of competition' in the foreign trade and extends the jurisdiction which the Federal Trade Commission now has over this subject in domestic commerce to unfair methods of competition in the foreign trade.

"Associations, when formed, may enter into agreements or conspiracies or perform acts beyond the territorial limits of the United States which may result in the destroying, seriously injuring or affecting our commerce, foreign and domestic, **by means other than by unfair methods of competition.** (p. 3.) * * * For this reason the Committee suggests the amendment at the close of Section 5 which reads as follows:

[13] Mr. Pomerene was a member of the Interstate Commerce Committee in 1914 when it reported the Federal Trade Commission Act and also a Manager for the Senate on the Conference Committee which produced the final version of that Act.

Wherever the Federal Trade Commission shall have reason to believe that an association or any agreement made or act done by such association is in restraint of trade within the United States or in restraint of the export trade of any domestic competitor of such association, or that an association either in the United States or elsewhere has entered into any agreement, understanding, or conspiracy, or done any act which artificially or intentionally and unduly enhances prices within the United States of commodities of the class exported by such association, it shall summon such association, its officers, and agents to appear before it, and thereafter conduct an investigation into the alleged violations of law. Upon investigation, if it shall conclude that the law has been violated, it may make to such association recommendations for the readjustment of its business, in order that it may thereafter maintain its organization and management and conduct its business in accordance with law. If such association fails to comply with the recommendations of the Federal Trade Commission, **said commission shall refer its findings and recommendations to the Attorney General of the United States for such action thereon as he may deem proper.** (Emphasis ours.) (p. 4.)

It is of interest and importance that the then Chairman of the Federal Trade Commission (Mr. E. N. Hurley) was present in January 1917 during hearings on the Export Trade Act by the Senate Committee on Interstate Commerce and that he there stated, in substance, that the Federal Trade Commission had no duty to enforce the Sherman Antitrust Act. He said,

> "The very fact that we would have all the facts before us and that they would be at the disposal of the Department of Justice at any time * * * would have a tendency to prevent any combination for foreign trade applying their organization to regulate their prices in domestic trade." (Hearings before Committee on Interstate Commerce, United States Senate, 64th Congress, 2nd Sess., on H.R. 17350, p. 64.)

Senator Cummins then asked Mr. Hurley if he did not think that "after the Federal Trade Commission had held that their contracts or their association was all-right—they ought to have immunity." To this Mr. Hurley replied: "I do not think so. **We have nothing to do with the Sherman law. If they violate the Sherman law, that is up to the Department of Justice.**" (Hearings before Committee on interstate Commerce, United States Senate, 64th Congress, 2nd Sess., on H.R. 17350, p. 65.)

The Congressional sponsors of the Export Trade Act clearly understood that any domestic "price fixing" resulting from any combination for export trade would not be taken care of by the Trade Commission.

Congressman Webb, the House sponsor of the Act, stated: "That if the combination for export trade affects unduly or artificially the prices in the United States, then they come within the Sherman Antitrust Law." (55 Cong. Rec. p. 3565.)

The following passages from the debates on the Bill confirm the lack of any power in the Commission to enforce the Sherman Act:

* * * * *

"Mr. Webb. * * * The moment these agencies begin to act so as to be unfair, not to restrain trade, but to be unfair, the Federal Trade Commission can jerk them into the court and stop it by injunction and send them to jail. The moment they begin to restrain trade in the United States the Sherman antitrust law steps in. * * * (55 Cong. Rec., p. 3,577.)

* * * * *

"Mr. Saulsbury. * * * This bill, I think, is the considered judgment of practically all the members of the Interstate Commerce Committee, with a very few exceptions; and we want to get action on this matter, because we have considered it in that committee for years. We considered it before we passed the Clayton bill. I remember that it was under consideration in the committee in connection with the Clayton bill before that bill came over from the House. At that time we were considering the two bills, the Federal Trade Commission bill and the Clayton bill, jointly, intending to bring them into the Senate as one bill; and I

> think practically all the considerations that have been referred to here had some discussion as long ago as the time before we brought in the Federal Trade Commission bill." (56 Cong. Rec., p. 183.)

Adoption in the Export Trade Act of the term "Unfair methods of competition" as used in the Trade Commission Act, gives further evidence that Congress intended that the term should not include violations of the Sherman Antitrust Act.

Is there any inconsistency between the construction of the term "unfair methods of competition" when used in the "Export Trade Act" and when used in the "Federal Trade Commission Act"? We do not think so.

If the term "unfair methods of competition" as used in the Trade Commission Act "shall be construed" as extending to and including "a combination to restrain competition in restraint of trade,"—a violation of Section 1 of the Sherman Antitrust Act, then the same construction must be followed in determining the application of Section 4 of the Export Trade Act. The absurdity of such a construction quickly appears by a few simple tests. Suppose that Section 5 of the Trade Commission Act be considered as written in the following words:

> "That unfair methods of competition in commerce, including any combination in restraint of trade, are hereby declared unlawful."

then Section 4 of the Export Trade Act would have been as follows:

> "That the prohibition against 'unfair methods

> of competition, including any combination in restraint of trade' and the remedies provided for enforcing said prohibition contained in the Act entitled 'An Act to create a Federal Trade Commission,' * * * shall be construed as extending to unfair methods of competition, including any combination in restraint of trade, used in export trade * * *."

Then, indeed, if such construction be the proper one, the concurrent authority in the Trade Commission and in the Department of Justice to institute proceedings to restrain any combination in restraint of trade would be plainly expressed.

If the prohibition of "unfair methods of competition" is to be construed as including a combination in restraint of trade, and Section 4 of the Export Trade Act thus must extend this same prohibition to the Export Trade, then what is left of the exemption contained in Section 2 of the Export Trade Act to the effect that a combination in export trade shall not be construed as declared to be illegal by anything contained in the Sherman Act? Would not such construction of the term "unfair methods of competition" entirely nullify the purpose to have been achieved by the enactment of the Export Trade Act?

If the term "unfair methods of competition" as used in Section 5 of the Trade Commission Act shall be construed to refer to and include "a combination to restrain competition in price," then it necessarily follows that the same term, when it is repeated from

the Federal Trade Commission Act in Section 4 of the Export Trade Act, means exactly what it meant in Section 5 of the Trade Commission Act. Otherwise there would be an absurd inconsistency between the meaning of the selfsame terms as used first in the Trade Commission Act and then repeated in the Export Trade Act.

An absurd inconsistency between Section 4 of the Act and Section 2 of the same Act certainly would exist if the term, "unfair methods of competition," shall be construed to include "a combination to restrain competition in price." This is true because Section 2 of the Export Trade Act specifically modifies the Sherman Antitrust Act so that any agreement or combination in restraint of competition in price entered into or maintained in the course of export trade is not to be declared illegal, but then Section 4 of the same Act would authorize the Trade Commission to institute proceedings to restrain the very "combination" which under Section 2 of the Act the Department of Justice could not proceed against because of the modification of the Sherman Act therein contained.

If the term "unfair methods of competition in commerce" be construed to include "every combination in restraint of trade among the several states," then since Section 1 of the Sherman Antitrust Act of 1890 provided that "every * * * combination in restraint of trade * * * among the several states, * * * is hereby declared to be illegal," it must be presumed that

the Congress that declared in 1914 "That unfair methods of competition in commerce are hereby declared unlawful;" was to that extent reenacting Section 1 of the Sherman Antitrust Act. Such a presumption is untenable.

Again, if "the prohibition against 'unfair methods of competition' and the remedies provided for enforcing such prohibition contained in the Act entitled 'An Act to create a Federal Trade Commission * * *'"[14] shall be construed as including "every combination in restraint of trade among the several states," then it must be presumed that the Congress for the second time was to that extent reenacting Section 1 of the Sherman Antitrust Act when it enacted Section 4 of the Export Trade Act. Such presumption is equally untenable.

In September, 1914, when the Congress enacted the Federal Trade Commission Act, it provided in Sections 6(c), (d) and (e), for the Trade Commission certain specific administrative duties in aid of a more efficient administration of the Antitrust Acts by the Attorney General. Three and a half years later in April, 1918, when Congress enacted the "Export Trade Act," it again assigned similar administrative duties to the Trade Commission in Section 5 of that Act—again in aid of the administration of the Antitrust Acts by the Attorney General. In both Acts it is clearly provided that the Trade Commission is charged with the duty of investigating and is granted

[14] See Section 4, Export Trade Act, page 24, *supra*.

authority to make recommendations. It shall transmit to the Attorney General a report of "its findings and recommendations".

While each statute "empowered the Commission to investigate, recommend and report," neither gave the Commission "authority to make any order or impose any prohibition or restraint, or make any binding adjudication with respect to these violations."

The Case of United States Alkali Export Association v. United States.

(325 U. S. 196, (1945))

The *Alkali* case presented to this Court for the first time the question of whether or not the complete and exclusive control over proceedings "to prevent and restrain violations" of the Sherman Antitrust Act has been retained by the Department of Justice and the Federal Courts, regardless of the series of Acts which includes the Trade Commission Act, the Clayton Act and the Export Trade Act. It was contended that the Department of Justice has no authority to institute proceedings under Section 4 of the Sherman Antitrust Act against the defendant export association unless and until the Federal Trade Commission had completed an investigation and made recommendations in accordance with Section 5 of the Export Trade Act. The question was deemed of such importance that this Court granted a writ of certiorari in advance of a final decree. The situation was aptly characterized

by Mr. Justice Douglas in his dissent in the *DeBeers Mines* Case saying that,

> "If the defendants * * * were right in their contention, a trial on the merits would have frustrated the statutory scheme which Congress had designed for the control of antitrust activities," (*DeBeers Consolidated Mines* v. *United States*, 325 U. S. 212, 223).

Such a situation is paralleled in the case at bar.

In the *Alkali case*, upholding the unimpaired right of the Department of Justice to proceed, Chief Justice Stone refers to "the language of the statutes," and "their legislative history" as follows:

> "Section 4 of the Sherman Act invests the several district courts with jurisdiction to restrain violations of the Act; and it imposes on district attorneys of the United States, under the direction of the Attorney General, the duty to institute suits in equity in their respective districts, to restrain such violations. * * * (pp. 199-200.)
>
> * * * * *
>
> "* * * During the twenty-eight years between the enactment of the Sherman Act and the passage of the Webb-Pomerene Act, the plenary authority and settled practice of the Department of Justice to institute antitrust suits, without prior proceedings by other agencies, became firmly established. A pro tanto repeal of that authority, by conferring upon the Commission primary jurisdiction to determine when, if at all, an antitrust suit may

appropriately be brought, would require a clear expression of that purpose by Congress." (pp. 205-6.)

There is no "clear expression" in the Federal Trade Commission Act, or anywhere else, of any partial repeal of the "plenary authority and settled practice of the Department of Justice" under Section 4 of the Sherman Act. The Webb-Pomerene Act, with its extension of the "prohibition against 'unfair methods of competition'" in Section 5 of the Federal Trade Commission Act to the export trade (Section 4), "contains no explicit indication to that end." (p. 206.) Furthermore, the Federal Trade Commission Act expressly provides in Section 11 that it shall not be **"construed"** so as to "alter, modify or repeal" the Sherman Antitrust Act.

"In determining whether the Webb-Pomerene Act curtailed the then existing authority of the United States to bring antitrust suits, it is important to consider what that Act did not do, as well as what it did. True, it exempted from the antitrust laws some, but not all, acts which would otherwise have been violations. But while it empowered the Commission to investigate, recommend and report, **it gave the Commission no authority to make any order or impose any prohibition or restraint, or make any binding adjudication with respect to these violations.**

"This is in marked contrast to the Commission's power to issue cease and desist orders with

respect to violations of § 5 of the Federal Trade Commission Act, as amended, 15 U.S.C.A. § 45, * * *." (p. 206.)

It was argued that Congress could not have intended to give the Commission authority to pursue its investigations, recommendations and reports concurrently with action by the Department of Justice to enforce the Sherman Act. This afforded the Court the opportunity to point out the limited authority of the Commission with respect to the Sherman Act:

> "This argument overlooks the fact that the Commission's authority is to investigate and recommend, not to restrain violations of the antitrust laws (save as they may incidentally be violations of other statutes which the Commission may enforce).[15] The Commission by its investiga-

[15] In reference to this parenthetical clause:

A monopoly in violation of Section 2 of the Sherman Act may incidentally include acquisition of stock of a competitor in violation of Section 7 of the Clayton Act, which is an "Antitrust Act." Under Section 11 of the Clayton Act, the Commission could proceed against the stock holding, but the Commission could not proceed against the greater evil, the monopoly. (*Arrow-Hart & H. Electric Company* v. *Federal Trade Commission*, 291 U. S. 587, 599; *Thatcher Manufacturing Co.* v. *Federal Trade Commission*, 272 U. S. 554, 561; *Swift & Company* v. *Federal Trade Commission*, 272 U. S. 554, 563.)

The debates in Congress on the Trade Commission Act developed that "the Attorney General usually alleges the use of unfair competitive practices in support of his main contention that a monopoly exists which ought to be dis-

tions and recommendations, may render a useful service in bringing violations to the attention of the Department of Justice or by showing that resort to the courts is unnecessary, either because there has been no violation or because the associations have satisfactorily corrected their trade practices. But the Commission, under the Webb-Pomerene Act, does not enforce the antitrust laws; its powers are exhausted when it has referred its findings to the Attorney General. Indeed, the provisions for such reference are necessary not because the Commission has a primary jurisdiction, but only because it cannot itself enforce the antitrust laws. Further, there is no want of specific authority for the United States to enforce the antitrust laws; the violations here alleged are not violations of the Webb-Pomerene Act, but of the Sherman Act, and it is the latter which provides for suits to be brought by the United States." (p. 208.)

The holding of this Court with respect to the Webb-Pomerene Act is equally applicable to the Federal Trade Commission Act. Chief Justice Stone points out that the power of investigation in the Webb-Pomerene Act with respect to the Sherman Act,

"* * * is consonant with and closely related to

solved. The injunction against the future use of such practices is only an incidental part of the decree." (Mr. Hollis, 51 Cong. Rec. p. 12,146; see also *Standard Oil Co.* v. *United States*, 221 U. S. 1, 42 (1911) and the "unfair methods of competition" (p. 42) alleged there in support of the charge of monopoly.)

another important function of the Commission, which from the beginning has had extensive powers to investigate and report on practices which concern or affect the enforcement of laws relating to trade and commerce, including the antitrust laws. Such investigations by the Commission have never been deemed prerequisite to antitrust suits by the United States; and **there is nothing to suggest that Congress, in authorizing the Commission to investigate export associations, intended to place such investigations on any different footing than others which the Commission had already been authorized to conduct.**" (Emphasis ours, pp. 206-207.)

THE 1938 AMENDMENT TO THE FEDERAL TRADE COMMISSION ACT.

Since its enactment, the Trade Commission Act has been amended once only. That was in 1938 when the "Wheeler-Lea Bill" attempted to circumvent the situation appearing from the decision of the Supreme Court in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643 (1931), to the effect that statutory jurisdiction of the Commission depended upon showing that the "unfair method of competition" charged actually had an injurious effect upon a competitor.

The instant case against the cement industry was instituted by the Commission in July, 1937, prior to the effective date of the 1938 Amendment to the Trade

Commission Act. It may well be that the opinion of this Court in the *Raladam case* raises a serious question in the instant case of whether there is any allegation, finding or order that would justify the jurisdiction of the Commission on the basis of any actual "injury to a competitor." However, that is scarcely germane to our present inquiry.

The discussion of the proposed amendment was before the Committee on Interstate and Foreign Commerce of the House of Representatives in 1937, and it led to the subject of control of Sherman Act cases by the Department of Justice and the subservient position of the Federal Trade Commission, in that their relationship to Sherman Act cases consisted in making reports from time to time to the Department of Justice when Trade Commission investigations disclosed a state of facts indicating violation of the Sherman Act. The following colloquy between Trade Commissioners Davis and Ferguson, who were before the Committee advocating the amendment, and Congressman Mapes, bears directly upon our inquiry and shows that, whether sincere or not, these members of the Trade Commission represented to the Committee of Congress that the Trade Commission was not seeking to infringe upon the duties exclusively assigned to the Department of Justice and the United States Courts in proceedings to enforce the Sherman Act:

"Commissioner Davis: From time to time our investigations of a subject may lead into a state of facts which we think should be brought to the

attention of the Department of Justice as possible violations of the Sherman Act and which were brought to their attention. That occurs from time to time. * * *

"Mr. Mapes: * * * You say that you do not always bring it to the attention of the Department of Justice.

"Commissioner Davis: I say we do not, generally speaking.

"Mr. Mapes: You do not often do that?

"Commissioner Davis: I say this: I suppose that we bring to the attention of the Department of Justice 1 case out af 500, or 1,000 that we investigate. Commissioner Ferguson, is that about right?

"Commissioner Ferguson: Matters where we have exclusive jurisdiction. There are matters over which they have jurisdiction also.

"Commissioner Davis: Let me see if I can make myself clear. Now, you understand the **Department of Justice** and we both have jurisdiction over certain sections of the Clayton Act. We have exclusive jurisdiction over our act. **They have exclusive jurisdiction over the Sherman Act.**

"Mr. Mapes: You have joint jurisdiction over the Clayton Act?

"Commissioner Davis: Certain sections of the Clayton Act. Now, there has been absolute harmony between the two departments. We do not, both of us, commence in the same case. * * * There

is a good deal of interoffice information in the departments of the Government all acting as they see it in the public interest; but there is absolute harmony. We run into a state of facts, as Commissioner Ferguson suggested, in which the Department of Justice has exclusive jurisdiction, if we think it is sufficiently serious that it should be brought to their attention, we just bring it to their attention. We do not recommend that they proceed. We generally call it to their attention and state that our files will be made available to them, if we have any.

"Mr. Mapes: You do not in any case make recommendations to the Department of Justice?

"Commissioner Davis: I do not recall any.

"Mr. Mapes: I think this is true, Judge Davis, that the public perhaps does not distinguish between the jurisdiction of the Federal Trade Commission and the jurisdiction of the Department of Justice. Before you went on the Commission, I think it was, a good many of my constituents, furniture manufacturers, were prosecuted by the Department of Justice for alleged violations of the Clayton Act and the preliminary investigations, I understand, were all conducted by the Federal Trade Commission, and I am quite sure that the manufacturers think that their trouble was all due to the activities of the Federal Trade Commission.

"Commissioner Davis: Well, that was before my time on the Commission, but I suppose that

when the facts were developed, that the Commission felt that it was a Sherman Act case and they referred the facts to the Department of Justice; but I do not recall of any instance since I have been on the Commission where the Commission has undertaken or presumed to recommend what the Department of Justice should do in any such instance." (Hearing before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Congress, 1st Session, H.R. 3143 (Feb. 18-19, 1937) pp. 16-17.)

A subsequent statement made by Congressman Lea shows that the Committee of Congress relied upon the assurance thus given by Commissioners Davis and Ferguson as to the distinction between the duties of the Trade Commission and the Attorney General with reference to the administration of the Antitrust laws. Congressman Lea's statement is as follows:

"With reference to the Antitrust laws, the function of the Federal Trade Commission is to investigate the facts and report to the Attorney General. That is different from the duties as to unfair trade practices." (83 Cong. Record, p. 3939.)

Until Lately the Federal Trade Commission Has Not Claimed the Right to Enforce the Sherman Act.

In addition to the direct statement by an early Chairman of the Federal Trade Commission, heretofore quoted, there is convincing evidence that the

Commission in the first decades of its existence made no open claim of authority to restrain violations of the Sherman Antitrust Act.

After the passage of the Export Trade Act the Federal Trade Commission in 1919 published a pamphlet labeled, "Foreign Trade Series No. 1" and entitled, "Discussion of, and Practice and Procedure Under the Export Trade Act." Therein the Commission stated:

> "The penalty for the violation of Section 5 of the Act is enforcible by the District Attorneys of the United States under the direction of the Attorney General, and not by the Federal Trade Commission, **and the enforcement of the Sherman Law is a duty of the Federal Courts upon proceedings instituted by the Department of Justice.**" (p. 6.)

The Trade Commission has never in any of its Annual Reports concerning the nature and extent of its duties claimed the authority to institute proceedings to enforce the Sherman Act or that it was vested with jurisdiction to try contested issues under a charge of violation of the Sherman Act or to issue an order to prevent and restrain violations of the Sherman Act.

As typical of the Commission's own conception of its powers and duties shortly before the Complaint in the instant case was issued, we turn to the Commission's Annual Report for the fiscal year ending June 30, 1937. Herein it is recited that,

> "The Commission is an administrative body exercising quasi-judicial functions. These functions are chiefly:

(1) To prevent unfair methods of competition in interstate commerce;

(2) To make investigations at the direction of Congress, the President, Attorney General, or upon its own initiative;

(3) **To report facts in regard to alleged violations of the Antitrust Laws;**

(4) To prevent discriminations in price and other forms of discrimination in violation of the Robinson-Patman Act amending the Clayton Act;

(5) To prevent exclusive dealing in contracts, capital stock, acquisitions and interlocking directorates in violation of the Clayton Act; and

(6) To administer the Webb-Pomerene or Export Trade Act, aimed at promotion of foreign trade by permitting the organization of associations to engage exclusively in export trade." (Marquette's Exhibit 11, p. 3.)

Under date of December 13, 1945, the Trade Commission published the statement:

"The Federal Trade Commission * * * shares with the Department of Justice the function of enforcing the Antitrust Laws." (Report of the Federal Trade Commission on Resale Price Maintenance, page LXI.)

Apparently the Federal Trade Commission had grown greatly in authority and power since those early days of January 1917 when its Chairman publicly stated, "We have nothing to do with the Sherman Act.

If they violate the Sherman Act that is up to the Department of Justice," and since Trade Commissioner Davis in February 1937, before the Interstate Commerce Committee of the House of Representatives, said:

> "Let me see if I can make myself clear. Now, you understand the Department of Justice and we (the Trade Commission) both have jurisdiction over certain sections of the Clayton Act. We have **exclusive** jurisdiction over our act. They have **exclusive** jurisdiction over the Sherman Act." (Emphasis ours.)

Today the man in the street might aptly ask, "How did they get that way? Did Congress grant more power to this bureau? Or was it the Supreme Court?" His better informed companion might then reply, "Wrong guess. They didn't get that way over night. Congress didn't amend the statutes and you ought to know that under our Constitution the Courts have no power to legislate. A court could not add anything to or take anything from the authority which Congress gave the Trade Commission. Here's the answer. They came up the propaganda way."

And so they did and in the next section of this brief we relate the story of the Trade Commission's crusade against delivered prices in the "heavy goods" industries.

THE COMMISSION'S BIAS AND PREDETERMINATION OF THE PROCEEDING.

As interrelated with the Trade Commission's unauthorized exercise of duties which by statute are assigned to the Department of Justice and the Commission's usurpation of jurisdiction invested by Congress exclusively in the Courts of the United States, and as showing that by such means the respondents were deprived of a fair trial before an unbiased tribunal which would have been secured to them by the scheme of enforcement of the Sherman Antitrust Act designed and enacted by Congress, we now take up the uncontroverted evidence that the Commission was disqualified to try the contested issues because of bias and interest in the outcome. In truth the Commission was so prejudiced against the delivered price method of marketing, long the custom in the cement industry, that its ultimate order was not based upon substantial evidence of an industry-wide combination, but it was in fact a predetermined objective.

For a clear understanding of the Federal Trade Commission's complete lack of qualification as an unbiased tribunal in the instant case, it is first necessary to consider the background of the interest of the Trade Commission in the marketing methods of the cement industry prior to the beginning of the Trade Commission proceedings in July, 1937.

Section 6 of the Trade Commission Act, which

granted all the unusual powers to investigate, to report, to recommend, and the remarkable "power * * * to provide for the publication of its reports" proved an irresistible temptation for the Commission to begin upon unauthorized excursions into the speculative field of economics. Yielding to this temptation as shown by the resolution of the Commission of July 27, 1927,[16] as we shall see, eventuated in the Commission's "Crusade" to re-form the marketing methods of the heavy goods industries.[17]

Reports on Cement Industry by Trade Commission Prior to Its Complaint.

In July, 1927, the Trade Commission directed its chief economist to inquire into the delivered price, factory base, and basing-point methods of quoting and charging prices * * * and their effect on prices and competitive conditions. (Com. Ann. Rep. 1927, Marquette's Ex. 1, p. 38.) Specific industries were selected upon which to make a detailed study. A single

[16] See "Price Bases Inquiry, The Basing-point Formula and Cement Prices," (March 1932) (Marquette's Exhibit 16, p. 1).

[17] The Complaint sets forth:

"**The Industry.**

"PARAGRAPH THREE: Cement * * * production belongs to the class of heavy-goods industries. The carriage charges, for an overwhelming proportion of the sales of cement, constitute a substantial part of the cost to the customer." (Complaint, R. 41.)

commodity, cement, was chosen as the first study. This work progressed through the years 1928 to 1932. The Commission published the report on the investigation of the pricing methods in the cement industry, made on its own initiative, under the title "Price Bases Inquiry, the Basing-point Formula and Cement Prices, March, 1932." (Marquette's Ex. 16.)

As a result of the interest aroused by the Commission's investigation of the cement industry pursuant to its own resolution of 1927, the United States Senate in February, 1931, adopted a resolution directing the Trade Commission to investigate competitive conditions in the cement industry and to report to the Senate of the United States the facts with respect to the sale of cement, and especially the price activities of trade associations composed of manufacturers of cement; with respect to the distribution of cement, including a survey of practices of manufacturers and specifically **"whether the activities in the cement industry** on the part of trade associations, and manufacturers of cement **constitute a violation of the Antitrust Laws of the United States and whether such activities constitute unfair trade practices."** (Emphasis ours.) (Com. Ann. Rep. for June 30, 1931, Marquette's Ex. 5, p. 224; see also Marquette's Ex. 17, pp. XI, 1-3.)

The report made pursuant to the Senate resolution was published by the Commission under the title "The Cement Industry," June, 1933. It purported to report the facts and conclusions with a reservation of

further "special consideration for the purpose of determining whether they involve violation of law." (Marquette's Ex. 17, Letter of Submittal, p. xvi.)

The final report of the Commission pursuant to the directions of Senate Resolution was published in the Commission's Annual Report of 1935. It closed with the statement that: **"The investigation revealed no evidence of monopoly."** (Marquette's Ex. 9, p. 147.)

Thus it appears, and there is no evidence in the record to the contrary, that with the publication in the Trade Commission's Annual Report of June 30, 1935, that "The investigation revealed no evidence of monopoly" as the Commission's final answer to the United States Senate's direction "to investigate competitive conditions in the cement industry," so far as the Trade Commission was concerned, the cement industry and its pricing and marketing methods had an official "white ticket" until the Commission issued its Complaint in the instant case in July, 1937.

The Commission laid its whole case—both Counts I and II—upon a charge of an industry-wide combination and conspiracy to use "what is known as a multiple basing point system." (Complaint, Counts I & II, Pars. Four and Five, Rec. 48, 54, 218.)

Marquette's Answer to the Commission's Complaint states:

> "That cement is generally sold at destination prices within its marketing area, * * * that such destination price method has been referred to as a

> 'multiple basing point method of pricing' and that the mills which have from time to time assumed price leadership have been referred to as 'basing points,' but * * * that any such so-called basing-points are not arbitrarily determined, have no fixity in number or location, are not the result of any agreement or understanding or concerted action;"

and

> "That 'basing-point' terminology has been erroneously used in, and as referring to, the cement industry;"

and

> "That * * * the destination price method which has generally prevailed in the industry, is to be distinguished from single and multiple 'basing-point systems' such as have prevailed in other industries." (R. 294-295.)

So stated, there is a sharply defined contested issue of fact as to whether or not there is any similarity between the pricing methods in the cement industry and the steel industry—beyond the use of similar nomenclature—and especially as we shall see, as to whether or not the elements of **combination** and **agreement** on "basing-points" and "basing-point prices" are involved in the pricing methods in the cement industry which the Commission asserted to be essential to the "basing-point system" in the steel industry.

The pertinent question is what is the meaning of

the term "What is known as a multiple basing-point system," as used in the Complaint in the instant case.

Of what does such a "system" consist? No definition is contained in the Complaint. In truth, an exact definition is nearly as difficult to find as an exact definition of "unfair methods of competition." As District Judge Lindley said in the opinion of the C.C.A. 7th in the *Corn Products* case.

> "We are not advised that such so-called system has any recognized legal definition or any well established boundary lines. Just what pattern it follows is uncertain." (*Corn Products Refining Co.* v. *Federal Trade Commission*, 144 F. (2d) 211, 216.)

Now when it is discovered that the Trade Commission published in its Annual Report of June 30, 1936, the statement:

> "The cement industry uses a basing point system similar to that of the steel industry," (Marquette's Exhibit 10, p. 31).[18]

it becomes a matter of some interest to see what the Commission has said in regard to the nature of that "system" in the steel industry.

When it is further discovered that under date of June 10, 1936, in a requested "Report to the President on Steel Sheet Piling," which had nothing whatsoever

[18] For descriptive list of Marquette Exhibits, see Appendix, page 205.

to do with the subject of portland cement, the Trade Commission had stated that:

> "Closely allied with the steel industry is cement. * * * The cement industry also uses a basing-point system similar to that of the steel industry, and, like the steel industry, defends it as an expression of competitive processes." (Marq. Ex. 21, p. 39)

it is immediately apparent that the Trade Commission is so prejudiced against the cement industry that it has been willing to go outside the subject matter of the report requested by the President to make gratuitous and completely baseless statements concerning the pricing methods in the cement industry, and it becomes **essential** to search out and to study what the Trade Commission said concerning the nature of this so-called "basing-point system" which it asserted was used in common by the steel industry and by the cement industry.[19]

We begin with the "Report on Steel Industry by the Federal Trade Commission to the United States Senate

[19] The easily ascertainable fact was that only one cement manufacturer out of the 75 respondents was in any wise connected with the steel industry. All portland cement is sold in direct competition with other products of the steel industry. The statement was further untrue as to the pricing methods in the cement industry being even substantially the same as those in the steel industry, and as does above appear this was one of the sharply contested issues in the instant case. Contrast the quotation of basing point prices in the steel industry (Exhibit 4, Appendix, page 233) with the quotation of delivered prices in the cement industry. (Commission's Exhibit 3201E, Appendix, page 234.)

in Response to Senate Resolution," March 20, 1934 (Marquette's Exhibit 18):

"Briefly stated, members * * * must calculate delivery charges from specified common basing points according to a specified formula * * *." (p. 4.)

"The first step in any analysis of this system of delivered prices is a consideration of the methods by which the mill base quotation is determined. It is obvious that even fictitious and identical delivery charges could not produce identical delivered prices unless the mill-base quotations used by all mills were also identical."

* * * * *

"This identity can be definitely traced to co-operative action among the producers * * * organized as groups * * *. In some cases there is evidence of definite agreement or understanding to adopt certain mill base quotations." (p. 5.)

"For weeks before the code became effective the pig-iron producers were conferring and exchanging tentative lists of basing-point price quotations. * * * A schedule of basing-point price quotations was circulated among them by the secretary of their group, containing both basing-point and delivered prices for the principal consuming points in 22 states." (p. 8.)

"GROUP LIMITATIONS ON SELECTION AND ESTABLISHMENT OF COMMON BASING POINTS."

"The basing points now established were selected by the organized industry through the American Iron and Steel Institute and they can be changed only by similar action of the Institute as the code authority." (p. 16.)

"The conclusion to which one is forced by an examination of these facts is that **the level of base prices** under present practice **is not determined by the forces of competition but by the combined judgment of the organized industry** * * *." (p. 57.) (Emphasis ours.)

"The Code in effect declares unfair and unlawful the practice of f.o.b. mill-base pricing which the Commission assumed to be fair competition."[20] (p. 64.)

From these statements by the Commission it is plain that the elements of agreement upon the number and location of "basing points" and the "mill-base quotations" are **essential** to the system. There is more evidence on this point in the Commission's later statements in

"REPORT OF THE FEDERAL TRADE COMMISSION TO THE PRESIDENT WITH RESPECT TO THE BASING-POINT SYSTEM IN THE IRON AND STEEL INDUSTRY," (November, 1934. (Marquette's Exhibit 19)).

[20] One of the apparent objects of the "Crusade" is to compel the substitution of "f. o. b. mill" pricing for "delivered" pricing.

"THE MULTIPLE BASING-POINT SYSTEM OF THE STEEL INDUSTRY DESCRIBED.

"The system assumes a basing-point or points employed in common by all producers or shippers making use of the system. (p. 2.)

"COOPERATIVE DETERMINATION OF BASE PRICES.

"The methods by which so-called 'base prices' are arrived at were set forth in * * * the Commission's report to the Senate March 19, 1934 (quoted above). **There appear to be no facts from which it can be inferred that any change has taken place in these methods. * * * Illustrations of understandings and agreements were presented * * * in our report to the Senate** * * *. (p. 6.)

"Unless steps are taken to insure identity of base prices and unless base prices are in fact identical, this closely organized industry would be in the absurd position of having carefully and expressly provided against every element which could produce price competition at destination and ignoring the primary element without uniformity in which all their other efforts are set at naught. Common sense warrants the observation that intelligent men do not set up an elaborate and carefully articulated system without undertaking to bring under control an element impinging on their system which is not only amenable to control but patently vital to its success. Such an omission

would be like the neglect of a householder who carefully locks all the windows and leaves his front door wide open. * * *" (p. 7.)

THE COMMISSION'S PRE-COMPLAINT STATEMENTS OF UNLAWFULNESS OF THE "SYSTEM".

Now let us see what the Trade Commission said about the unlawfulness of these pricing methods. In the same report from which we have last quoted, it said:

"The alleged freedom from monopoly is absurd. The prices are monopolistic in the true sense. (p. 16.)

"Both legal and economic evidence has been presented to support the conclusion that the basing-point system is a price-fixing device which is subversive of normal competitive principles. (p. 17.)

"In certain respects the multiple-point system is a more efficient device for price fixing than the single-point system. (p. 29.)[21]

"CONCLUSIONS.

"Before there can be any consistent determination of public policy regarding price fixing by organized groups of competitors, the factual issue

[21] In the Trade Commission's report to T.N.E.C. entitled, "The Basing Point Problem," in 1939—issued while testimony was being taken in its proceedings against the cement industry—it referred to its "famous Pittsburgh Plus" pro-

must be faced whether there is price fixing. **So long as the idea is entertained that the factual condition may be an expression of competition rather than of a price fixing combination, there can be no logical treatment of that condition.** * * *

"The diagnosis which the Commission makes is that the basing-point system not only permits and encourages price fixing, but that it is price fixing. (Emphasis ours, p. 35.)

"Men who have invested their lives and fortunes in the manufacture and sale of goods should not, in view of the public interest, be intrusted with the responsibility of fixing prices. They will generally act with an eye to dividends rather than to the public welfare. This is no arraignment of the integrity of those who conduct business but is a recognition of their humanity, and of the soundness of the principle which underlies every judicial system, namely, that personally interested parties shall not be presumed to have unbiased minds." (p. 38.)

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ceeding against the United States Steel Corp. and certain of its subsidiaries and stated: "Following the Order of the Commission the Steel Industry adopted **what is known as a 'Multiple Basing-point System.'** " (p. XI, Emphasis ours). The Commission also stated on page 9 of the same brochure that "The Steel Industry is a focal center of monopolistic infection, which, if not eradicated, may well cause the death of free capitalistic industry in the United States." (Marquette's Exhibit 23.)

It was later to appear, when the Commission was challenged in the cement proceedings for bias, that the Commission conveniently forgot its declaration "of the soundness of the principle which underlies every judicial system," that interested parties make biased judges.

THE TRADE COMMISSION'S CRUSADE AGAINST "DELIVERED PRICES".

In the meantime the Commission became more and more "an interested party" in the pursuit of its "Crusade" to compel the substitution of f.o.b. mill, or shipping point, prices for the long established custom of pricing "heavy goods" at the buyer's destination.

Early in 1936 the Commission successfully sponsored and urged the Judiciary Committee of the House of Representatives to add to the Robinson-Patman amendment to the Clayton Act the very definition of price which is set forth in Count II of its Complaint. (Hearing before the sub-committee of the Committee of the Judiciary, House of Representatives, 74th Congress, Second Session, February 7, 1936, p. 504.) The opposition on the floor was so strongly opposed to the Trade Commission's definition that the Committee was compelled to withdraw it.[22]

[22] *Corn Products Refining Co., et al.* v. *Federal Trade Commission*, 324 U. S. 726, 736-7:

"This provision, as reported to the House by the Committee on the Judiciary, would have defined 'price',

Six weeks later Commissioner Freer appeared as the representative of the Trade Commission before the Senate Committee on Interstate Commerce urging the enactment of "The Bill developed by the Commission" "To Prevent Uniform Delivered Prices" or, as the

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as used in Section 2 of the Clayton Act, as meaning 'the amount received by the vendor after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor.'

"The practical effect of this provision would have been to require that the price of all commodities sold in interstate commerce be computed on an f.o.b. factory basis, in order to avoid the prohibited discriminations in selling price. It would have prohibited any system of uniform delivered prices, as well as any basing-point system of delivered prices. These effects were recognized in the Committee's report, * * * Indeed, the provision would have prohibited such a multiple basing-point system as that in *Cement Mfrs. Protective Assn.* v. *United States,* * * * as well as the present system.

"Such a drastic change in existing price systems as would have been affected by the proposed Amendment engendered opposition, which finally led to the withdrawal of the provision by the House Committee on the Judiciary. * * * We think this legislative history indicates only that Congress was unwilling to require f.o.b. factory pricing, and thus to make all uniform delivered price systems and all basing-point systems illegal *per se.* On the contrary we think that it left the legality of such systems to be determined accordingly as they might be within the reach of § 2(a), as enacted, and its more restricted prohibitions of discriminations in delivered prices." (pp. 736-7.)

Commission called it, "The Anti-basing-point Bill." (Hearings before the Committee on Interstate Commerce, on S. 4055, Senate, 74th Cong., 2nd Sess., Marquette's Exhibit 20, pp. 309-325.)

Mr. Freer referred to the Commission's reports concerning its investigations of steel, pig iron and cement. (p. 309.) He testified that:

> **"Delivered price systems involve a departure from the f.o.b. mill or open market method** and the substitution of a formula method." (p. 310.)
>
> "The Chairman: (Interposing.) As I understand it the Commission has repeatedly called attention to the basing point as a method of price fixing in their various investigations."
>
> "Mr. Freer: That is correct.
>
> "The Chairman: And **the Commission, apparently feels that the use of the so-called multiple basing-point system is a violation of the Sherman Antitrust law.**
>
> "Mr. Freer: **I would so gather from this report.**" (p. 312.)
>
> "The question of discrimination can only be gaged by the treatment the seller accords to buyers in terms of what he has left after paying any sums actually defrayed by him for transportation. **If, after subtracting from each delivered price the sum actually defrayed by the seller for freight, the net results are not identical, there is price discrimination.**"

"Such discrimination is inherent in delivered price systems. (p. 312.)

* * * * *

"Obviously such a method of pricing is arbitrary and artificial. It could not exist without the consent and active cooperation of all important units in a given industry. The reason that such a method is used, is that it affords the most effective way for the elimination of price competition.

"The various investigations made by the Federal Trade Commission have demonstrated the correctness of that statement. They have demonstrated that the common basing point or delivered price system in numerous industries is a price fixing device. (p. 322.)

"Price competition is abolished in industries having basing-point systems. (p. 323.)

* * * * *

"Delivered price systems present more than the usual results of monopoly. (p. 323.)[23]

"The Commission believes that these systems tend directly to price maintenance, not only collusive but dangerous to national prosperity, and that these systems tend also to an early return of depression. (pp. 324-5.)

* * * * *

[23] Compare this official statement of the Trade Commission on March 23, 1936, with the Commission's final report to the Senate, June 30, 1935, after six years investigation of the pricing methods in the cement industry: "The investigation revealed no evidence of monopoly."

"It is a matter of policy for Congress to determine whether the employment of the basing-point systems shall be specifically banned by statute.

"We believe that S. 4055 is drafted in proper form to attain that end.

"This concludes, Mr. Chairman, the statement which was prepared for the chairman of the Federal Trade Commission and which I was asked to read as his substitute." (p. 325.)

Apparently in 1936, the year preceding the institution of the Trade Commission proceeding, the Commission was still putting its trust in Congress and was also content to play up the exclusive authority of the Department of Justice to proceed against the so called "System" under the Sherman Act. In its "Report * * * On Steel Sheet Piling" following its thorough condemnation of the "System" and its utterly baseless and inexcusable statement that the cement industry is "Closely allied with the steel industry"[24] and that "The Cement industry uses a basing-point System similar to that of the steel industry," the Commission stated:

"Bills are now pending in both Houses of Congress that would make the operation of noncompetitive basing point systems unlawful *per se*. There are distinct advantages to be gained through legislation directly outlawing such basing point systems. The enactment of such a general act supplementary to the anti-trust laws would render unnecessary the separate investigation of a great

[24] Marquette's Exhibit 21, p. 39.

number of industries together with the effect of the system in each upon the competition therein, looking toward the bringing of separate proceedings with respect to each industry using such a basing point system. (Marquette's Exhibit 21, p. 41.)

"The Supreme Court in its interpretation of the Sherman Act (Anti-Trust Act of July 2, 1890) has uniformly recognized that said Act was directed against such evils. Hence **this matter is peculiarly within the province of the Department of Justice under the Sherman Act.**

"1. **It is, therefore, respectfully recommended that this matter be referred to the Attorney General for appropriate action.**" (p. 42.)

The Commission's faith was apparently betrayed. Congress refused to adopt the Commission's recommendation to include in the Robinson-Patman Act the definition of true price, as the amount remaining after deduction of the cost of transportation from the delivered price. The Interstate Commerce Committee of the Senate failed to report out the Commission's "Anti-basing-point Bill", and, as for the Attorney General, the death of that hope is recorded in the Commission's T.N.E.C. Monograph on the "Basing Point Problem" as follows:

"On April 26, 1937, the Attorney General reported to the President that an investigation by his department had failed to produce 'sufficient

evidence admissible in civil and criminal litigations to make advisable proceedings in court or under the Antitrust Acts as they have been construed by the Courts.'" (Marquette's Exhibit 23, p. 140.)

The Commission's Scheme for Depriving Respondents of the Safeguards Set Up in Congressional Plan of Enforcement of the Sherman Act.

At this point we can only speculate on what were the Commission's theories of procedure in 1937 when it began to "appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." They may have been upon such lines as follow.

As to the objection of the Attorney General of a lack of sufficient **admissible** evidence to justify a proceeding in a district court of the United States, that obstacle might easily be overcome by the less formal procedure and looser rules of evidence in the Commission's trials. No failure to prove an essential allegation of fact by a preponderance of the evidence should stand in the way. No broad consideration of the entire record by an upper Court should endanger the "Findings as to the Facts," or the "Cease and Desist Order." Under the limited right of review provided by the Trade Commission Act there appeared a fair chance that the Court of Appeals, faced with a record of horrific size, should listen with a sympa-

thetic ear when the Commission would artfully suggest (as it actually did) that:

> "Theoretically it is conceivable, but practically it is incredible that an administrative agency consisting of a body of experts 'appointed by law and informed by experience' might receive evidence of such huge proportions * * * and yet might have in such a record absolutely no substantial legally competent evidence. * * *. To seriously and formally take the position, as petitioners do, that such a vast record, * * * contains no substantial evidence to support the Commission's findings of fact, when coupled with the enormity of the task that petitioners thus ask the Court to assume, is patently unreasonable and absurd." (Pleading filed August 4, 1943, in Cases No. 8360, 8361, in Court below.)

As for the pretense of violation of the Sherman Antitrust Act—and the bizarre idea that such an alleged combination could be used as a horse upon which to hang the Congressionally rejected definition of "true price," under the guise of a resultant violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act,—even that did not seem too large an undertaking. Was there not at the least a possibility of establishing a colossal new pattern of procedure for mass application, and judicial enactment, of the "true price" definition? Was not this a great stake for an "up and coming" Commission to play for?

Thus the stubborn and persistent refusal of the Congress to enact statutes recommended by the Commission and the obtuse attitude of an Attorney General influenced by respect for the rules of evidence might be overcome. Best of all, if the scheme should stand up in a Court review, the "Old Cement Case" would be circumvented and emasculated.

Undaunted by the refusal of Congress to translate the Commission's schemes of economic reform into statutory law either by the devious means of including the Commission's definition of true price[25] in the Robinson-Patman Amendment to Section 2 of the Clayton Act or by the more direct prohibition of delivered prices in the Commission's "Anti-basing Point Bill" and undismayed by the Opinion of the Attorney General, the Trade Commission seems to have determined to ignore its own final report to the Senate.

The crusading Commission took the plunge and proceeded toward its predetermined end. On its own, in July, 1937, the Commission instituted a proceeding "to restrain" a violation of Section 1 of the Sherman Antitrust Act and also set up a completely novel "pattern for the application of the Federal Trade Commission Act and of Section 2(a) of the Clayton Act."[26]

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[25] Hearings before the Sub-Committee of the Judiciary, House of Representatives, 74th Cong., 2nd Sess., February 7, 1936, p. 504.

[26] Petition for Certiorari herein, p. 16.

Subsequently the Commission sought to excuse and justify its attempt to circumvent the Congressional repudiation of the definition of price which decorated the charge of "combination" repeated in Count II of the Complaint by setting forth in its findings the following:

> "The failure of Congress to define price as mill net, on which failure respondents rely, does not avoid the necessity of having some definite concept of price in performing the administrative duty of preventing price discrimination under the statute. * * *" (Commission's Finding 24(e), R. 16,130.)

When, as it might have expected,[27] it was challenged for bias and prejudgment, it did not deny any part of the charge, nor has it ever done so. It did not traverse the petition to recuse—nor the supporting affidavit showing timely action by respondent's counsel, when statements of prejudgment and bias were discovered. Though every member of the Commission had full knowledge of the extent of this bias and prejudice, not one of them recused himself as any judge would have done.

The cold fact is that the Commission did nothing whatever about this challenge of its fitness to weigh the evidence and to determine the hardly contested issues of fact, except to maintain silence on the point

[27] See Marquette's Exhibit 18, pp. 1 and 2, where the Commission admits that it must be circumspect in its statements or run the risk of disqualification.

for fourteen months. Then it issued its "Cease and Desist Order" and a separate order overruling the Petition to Recuse and denying the petitioner's offer in evidence of the twenty-three exhibits which were attached to and made a part of the Petition to Recuse. (R. 15949, 15954.)

With this separate Order the Commission included a statement of "grounds." Here the Commission makes disclosures that demonstrate the wisdom of Congress in designing the enforcement of the Sherman Act so that it should not be interfered with by the Trade Commission. For example, in these "Grounds" the Commission states:

> "All the published statements of the Commission which are relied upon * * * to support (the) petition and motion to recuse, were made in due course of the Commission's official duties in reporting to Congress and to the President as prescribed by Section 6 of the Act creating the Commission."
>
> "The Commission cannot provide the remedial relief contemplated by Section 5 of its organic Act through the procedure prescribed in that Section if its advisory reports to Congress, prescribed by Section 6 of the same Act, are to disqualify it from proceeding under Section 5."

The errors of the Commission lie in not confining itself to the scope of the duties assigned to it, Sections 5, and 6, and in trespassing upon the duties exclusively assigned to the District Attorneys and in usurping the jurisdiction invested exclusively in the

Federal Courts by Section 4 of the Sherman Antitrust Act. For example, when the President assigned to it the specific duty of investigating and reporting upon three certain bids for "Steel Sheet Piling"—that did not require the Commission to report its conclusions relating to the pricing methods in the entire steel industry, nor did it justify the repetition of what the Commission had said in condemning those pricing methods, as "price fixing," in a previous report to the President on the N.R.A. Code for the Steel Industry. (Marquette's Exhibit 21, pp. 18, 28, 38.) Unquestionably it did not authorize the Commission to make the statement that the Cement Industry was closely allied with the Steel Industry and that it used the same "System" of pricing which the Commission had declared to be unlawful, collusive price fixing in its report on steel. (Marquette's Exhibit 21, p. 39.)

These actions were not even referred to in the Commission's "Grounds." Was it doing "merely what Congress (or the President) directed it do" or was the Commission acting beyond the scope of the specific duty assigned to it? The claim of the Commission is invalid. However, if it be true that the duties of the Commission under Section 6 and the reports that it makes in connection therewith do tend to make it biased and prejudiced against those that it investigates and reports upon as the Commission admits, proper respect for "the interest of the public" would excuse the Commission from acting as a tribunal to try the contested issues. Especially is

this true where, as in the instant case, Congress had already provided a complete and very different plan for proceedings to "prevent and restrain" the very kind of unlawful combination charged by the Commission's Complaint.

Moreover, it was not intended by Congress that the Commission should go to such lengths in its reports as to predetermine issues of law. The Conference Committee removed the Senate provision authorizing "findings with respect to violations of the law." The House insisted on its version, approved by the Department of Justice, restricting the Commission to "report the facts." "Findings" and "conclusions of law, respecting violations," were not to be reported, since "The Attorney General should be left in full control, as the chief law officer of the Government, of the disposition of cases arising under the Sherman law. He would not be thus left if there were embodied in the report of facts * * * with respect to any investigations * * * concerning violations of the Sherman law, findings, that is to say, conclusions of law, respecting violations."[28]

The publication of substantially the same condemnatory *ultra vires* statement in Marquette's Exhibit 10 on June 30, 1936, was an aggravation of the Commission's vicious abuse of the Cement Industry. (Marquette's Exhibit 10, p. 31.) Nothing in "section 6 of the Act creating the Commission" prescribed such

[28] See Conference Report and explanation thereof by Congressman Covington, *supra*, pp. 43-47.

"official duties" for the Commission. There is nothing in the Trade Commission Act or in the record to support the Commission's assumption that it was its official duty to print and circulate any of the indirect, pre-Complaint attacks on the pricing methods of the Cement Industry.

Finally, the Commission in its "Grounds" takes refuge behind an unsupported plea of want of timely action by the respondent in calling the attention of the Commission to the fact that evidence of the Commission's prejudice and bias was discovered. Therein the Commission begins to dissemble and to throw dust in the eyes of its critics. It designates two of the least objectionable of all the twenty-three Marquette exhibits and puts them forward as the two "principal publications" of the Commission which it asserts were "well known to respondents" (R. 15,955-6). Of these exhibits, the first was a wholly unauthorized voluntary effort entitled, "The Basing Point Formula and Cement Prices," (March, 1932) (Marquette's Exhibit 16), and the second was the Commission's voluminous but **incomplete** report to the Senate on the "Cement Industry," June, 1933, (Marquette's Exhibit 17). Both were published before the Commission disinfected them by its exoneration of the Industry in its **final** report to the Senate, June, 1935. (Marquette's Exhibit 9, p. 147.)

Only Crusader's Zeal for a Predetermined End, Not "Findings of Fact," Accounts for the Commission's Order.

The Commission failed to find the elements of agreement in the location and number of "basing points" and "mill-base quotations" or so-called "basing point prices" which it had asserted were essential to the very existence of the "System." Actually the Commission found the evidence so overwhelming against it on these points that it was impelled to make completely contrary findings as follows:

In Paragraph Seven (b) of its "Findings" (R. 15,988-9), the Commission states:

> "The number and identity of base and non-base mills change from time to time. A base mill may, for reasons its management considers sufficient, become a non-base mill, and, similarly, a non-base mill may become a base mill."

and in Paragraph Nine of its "Findings" (R. 16,028-9), which deals with the subject of uniformity of prices, in paragraph (e) the Commission states that:

> "Except to the extent that the dissemination of delivered prices during the N.R.A. Code period and some seven months thereafter necessarily carried with it an exchange of base prices, and except for limited direct exchanges among certain respondents which the record does not show to have been made under the auspices of the Institute, there has been no systematic exchange

among the corporate respondents of basing-point prices or changes in such prices."

Notwithstanding the Commission's pretrial statements and condemnation of the "System" which the Commission had said was used in common by the Steel Industry and the Cement Industry[29] and was spreading to others, and the Commission's pronouncements relating to the elements of agreement essential to the "System" including the organized industry "AGREEMENT OR UNDERSTANDING TO ADOPT CERTAIN MILL BASE QUOTATIONS,"[30] "COOPERATIVE DETERMINATION OF BASE PRICES,"[31] "GROUP LIMITATIONS ON SELECTION AND ESTABLISHMENT OF COMMON BASING POINTS,"[32] the Commission found no evidence to support findings of such agreement among the cement producers and it could not avoid contrary findings.

What then was there to support the basic charge of combination and agreement to restrain and destroy price competition through the employment of **"What is known as a multiple basing point system,"** which the Commission had stated **was adopted by the steel industry following the Commission's order against Pittsburgh Plus?**[33] Did the Commission because of

[29] The Commission's Annual Report, June 30, 1936, Marquette's Exhibit 10, p. 31; also Report To the President on Steel Sheet Piling, Marquette's Exhibit 21, p. 39.

[30] Marquette's Exhibit 18, pp. 5-8.

[31] Marquette's Exhibit 19, pp. 6-7.

[32] Marquette's Exhibit 18, pp. 15-16.

[33] Marquette's Exhibit 23, p. XI.

the failure to prove and find any elements of agreement upon "basing points" or "basing point' prices" abandon the charge of combination and agreement? Did the Commission retract or in anywise repudiate its pretrial statements that this "System" is "a method of price-fixing," "a violation of the Sherman Antitrust law" and "could not exist without the consent and active cooperation of all important units in a given industry?[34] Did it correct its pretrial statement that:

> "Price competition is abolished in industries having basing-point systems"?[35]

The answer to each of these pertinent questions is, "NO." The Commission did nothing of that kind. On the contrary, true to its predilections and faithful to its "Crusade" to compel the substitution of an "f.o.b. mill" method[36] for a "delivered price" method of marketing in the heavy goods industries, the Commission carried on and issued its "Order to Cease and Desist" to restrain the respondents from "carrying out any agreement, combination or conspiracy" to do the several elaborately described things which in its pretrial

[34] Marquette's Exhibit 20, p. 322.

[35] Marquette's Exhibit 20, p. 323.

[36] The Commission had declared that "Delivered price Systems involve a departure from the f.o.b. mill method" (Marquette's Exhibit 20, p. 310) which the Commission "assumed to be fair competition." (Marquette's Exhibit 18, p. 64.) Later the Commission clearly stated, "The open f.o.b. mill price system is essential, **in the Commission's opinion**, for the maintenance of fair competition in steel." (Marquette's Exhibit 23, p. 9.)

statements it had condemned in such statements as "Delivered price systems present more than the usual results of monopoly," and "are dangerous to national prosperity."[37] All of these things and more this Commission had said in the course of its unsuccessful campaign to outlaw delivered prices and "basing point systems" and to induce the Congress to enact legislation to support and enforce the Commission's economic theories.

Duplication of Trade Commission Proceeding in Department of Justice "Denver Case" of 1945.

June 28, 1945 the Department of Justice instituted a proceeding in the District Court of the United States at Denver, Colorado, against the Cement Institute and all the respondents named in the Trade Commission's proceeding—under Section 4 of the Sherman Anti-trust Act, based upon substantially the same allegations and seeking the same restraining order.[38] Here was an apparent recognition by the Department of Justice that the Trade Commission had overreached Justice and "the duties and powers" which Congress had defined in the Trade Commission Act. Here was direct notice that the public interest required the Commission to "Cease and Desist" from its trespass upon the exclusive statutory duties of the District

[37] Marquette's Exhibit 20, p. 323-4.

[38] As subsequently reported by the Commission to the Court below, a slight variation in the relief prayed in the Denver Case was removed by Amendment. See Amendment to Complaint, Appendix herein, p. 232.

Attorneys and the jurisdiction of the Courts of the United States. The Commission remained unabashed. When the petition of the respondents, Huron and Marquette, seeking equitable relief from this dual attack was presented to the Court of Appeals, the Trade Commission vainglorioously refused to relinquish its assumed right to proceed against the "Combination," actually asserted a sort of "lis pendens," and without the slightest right it argued that,

> "The real question is which of the two cases should be expedited on its way to a final decision,"

adding that:

> "To the extent that the petitioners are embarrassed by the second proceeding (in the District Court of Colorado) it would seem that their logical course would be to set up the first proceeding as a ground for relief or delay against the second." (Trade Commission's Answer to Joint Petition for Relief, filed August 25, 1945 in Court below. Supplemental Record in this Court, p. 61.)

But in the Denver proceedings the Department of Justice resisted a stay on the ground that:

> "No decision by the Seventh Circuit Court of Appeals in that matter will decide or determine the issues before this Court. * * *
>
> "The jurisdiction of the Seventh Circuit Court of Appeals in the case now pending before it is limited by the provisions of the Federal Trade Commission Act, * * *"

"The Federal Trade Commission act provides: 'No order of the Commission or judgment of the Court to enforce the same shall in any wise relieve or absolve any person, partnership or corporation from any liability under the Anti-trust Acts.'

"And then Section 11 of the Federal Trade Commission Act says:

> 'Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the Anti-trust Acts or the Acts to regulate commerce.'

"In view of this express statement by the Congress, there is no support for these motions of the defendants which do seek to delay and interfere with the prosecution of this suit because of the pending matter before the Seventh Circuit Court of Appeals." (Statement by Assistant Attorney General Haddock in opposition to a motion of defendants to stay proceedings in *U. S. A.* v. *Cement Institute, et al.*, D. Ct. of Colorado, Civil No. 1291, Tr. pp. 51,-2,-3.)

The Court, in sustaining the Attorney General's objections to a stay, stated:

"This Court has no jurisdiction or right to say that these two actions shall not proceed simultaneously. Under the law as it now stands, that is a matter to be decided solely in Washington—the Attorney General of the United States

and the Federal Trade Commission—and the relief that counsel ask for of not being compelled to try two cases simultaneously is a matter for the legislative and not the judicial Department of the Courts." (Transcript of Hearing, supra, p. 70; Supplemental Record in this Court, p. 40.)

THE TRADE COMMISSION PROCEEDING IS CONTRARY TO THE PUBLIC INTEREST.

It is within the equitable powers of this Court to relieve the undue burden placed upon the Courts, the public, and, incidentally, the respondents in the instant case, and defendants in the *Denver* case, from this gross abuse of process. When it is fully realized that the Commission's usurpation of the statutory duties of the District Attorneys of the United States and the statutory jurisdiction of the District Courts of the United States came about through its zeal to compel the compl te reformation of pricing methods in the heavy goods industries, and that instead of the usual "Cease and Desist Order" against some specified "unfair method of competition" or "discrimination" in the prices actually charged in the sale of some commodity in commerce, the Order is exactly such an order as might be entered by a district court in an equity proceeding,—in fact, almost exactly the order that is prayed in the petition filed by the Department of Justice in the *Denver* Case,—it must

be concluded that the Solicitor General's statement in the petition for certiorari is literally true; that,

> "The case is far removed from the usual proceeding under the Federal Trade Commission Act to stop a particular concern from using a trade name or trade practices believed to be misleading or otherwise unfair. The substantive issues are substantially those which arise in an equity proceeding by the United States to enforce the Sherman Act, which issues Congress has deemed to be of such importance that direct appeal should lie to this Court."

The case is directed only against a "combination in restraint of trade"—violation of Section 1 of the Sherman Antitrust Act.

The proceeding should never have been instituted by the Commission, and, certainly, when the Department of Justice instituted the duplicate proceeding in the District Court of the United States for the District of Colorado, the Trade Commission proceeding should thereupon have been dismissed.

The Commission's procedure in the instant case has been contrary to the public interest and an abuse of the discretion allowed to it by the Trade Commission Act. Section 5 (b) of the Trade Commission Act authorizes the Commission to **proceed only** when a "proceeding by it * * * would be to the interest of the public." (38 Stat. 719; 15 U.S.C.A., Sec. 45.)

> "The specific facts established may show, as a

matter of law, that the proceeding which it authorized is not in the public interest, within the meaning of the act. **If this appears at any time during the course of the proceeding before it, the commission should dismiss the complaint.** If, instead, the commission enters an order, and later brings suit to enforce it, the court should, without inquiry into the merits, dismiss the suit." (*Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 30; 74 L. ed. 139, 146.) (Emphasis added.)

The action of the Commission has burdened the respondents and the Courts with a proceeding to review and set aside a restraining order, issued by the Commission, substantially the same as that authorized by the Sherman Act to be entered by a District Court of the United States but which the Department of Justice has successfully contended does not bar or in any wise interfere with another proceeding instituted by the Department of Justice against The Cement Institute and all the respondents in the Trade Commission proceeding, based upon the same charge of combination, substantially the same allegations of fact, and praying for substantially the same restraining order as that issued by the Commission. This proceeding is still pending and going forward toward trial.

It is the contention of the Respondent, Marquette, that it was an abuse of such discretion and contrary to the, "Public interest," for the Commission to have

begun and to have conducted the proceedings against the cement producers. The Commission was biased and prejudiced against the pricing methods which it declared the Cement Industry was using. The Commission had prejudged the contested issues of ultimate fact upon which its accusations of violation of the Sherman Act and the Clayton Act necessarily depended. It had exceeded its authority in publishing such statements of prejudgment and guilt. It had without foundation of fact stated a close alliance between the Cement Industry and the Steel Industry; and that the Cement Industry used a similar basing point system to that used in the Steel Industry. The Commission had found as a fact and published the findings that this "System" included and depended upon agreements as to the number and location of "Basing-points" and as to "Basing-point prices" and that such a "System" violated the Anti-Trust Acts—the Sherman Act and Clayton Act, etc., etc. The Commission without any direction of the Congress and without any requirement of law and entirely of its own volition had given such statements and findings "the widest possible publicity." The Commission on its own motion had conducted a "Crusade" and was still conducting it—to arouse public opinion against the pricing methods it falsely asserted the Cement Industry was using, and to induce Congress to specifically outlaw delivered price methods of selling "heavy goods" such as cement. It made its reports a part of its propaganda for such legislation.

Its proceeding against the Cement Industry clearly was and is only a part and parcel of the Commission's voluntary "Crusade" to reform the pricing methods in the "heavy goods" industries and to compel the adoption of "Fetter System of F.O.B. Mill Pricing," all as a part of the Commission's self chosen task of economic reform.

Such an agency could not possibly have given the accused cement producers a fair trial required by due process.

To permit the Commission to go through the mockery of trial of the contested issues arising under the Commission's complaint and to go through the form of again finding the accused producers guilty would be contrary to the public interest and an abuse of the judicial discretion claimed by the Commission. For this Court to sustain this Commission's orders as against a Petition to set them aside for bias and prejudgment would tend to destroy the last vestige of respect for and faith in the many "Administrative Agencies" which have been entrusted with "quasi-judicial powers."

It is not in the public interest to encourage administrative tribunals to ride unchecked on their pet hobbies and predilections, going through the form of hearings only to reach a pre-determined end. This, and other courts, have spoken on the subject:

> "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the

highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play." (*Morgan* v. *U. S.*, 304 U. S. 1, 22; 82 L. Ed. 1129, 1134.)

CONCLUSION.

The judgment of the Court below vacating the Order of the Federal Trade Commission should be affirmed for all the "Additional Reasons For Sustaining Judgment of Court Below" herein before set forth.

THE CASES.

Jurisdiction.

The point that the Federal Trade Commission has no authority to institute proceedings to enjoin a combination in restraint of trade or to try such a proceeding and to issue an order restraining such a violation of Section 1 of the Sherman Act has never been squarely presented to this Court. Literally, there are

no decisions of this Court reviewing Trade Commission proceedings directly on this point. Few cases have been before this Court in which the scope of the duties of the Trade Commission has been the issue upon which the case was decided. The more important ones were the *Gratz Case* (1920), the *Bunte Case* (1941), and the *Alkali Case* (1945). The *Bunte Case* was a matter of a slight stretching of the Trade Commission Act to serve what the Commission considered a moral end but which the Congress had not yet provided for. The *Alkali Case* is of special interest in that it did involve an examination and an exposition by this Court of the distinction between the respective duties of the Federal Trade Commission and the Department of Justice as provided by Congress. (Supra, p. 69.)

In the Circuit Courts of Appeals are only two cases of any considerable importance. The *Goodyear Case* (1939) and the *Dietzgen Case* (1944). The *Goodyear Case* (*Goodyear Tire & Rubber Co.* v. *Federal Trade Commission,* 101 F. (2d) 620, C. C. A. 6, 1939) is of interest as an outstanding example of the Trade Commission's effort to extend a statute to suit the Commission's theory of what the Statute ought to be, well in advance of action by the Congress to make it so. This unauthorized assumption, by the Commission, of power to legislate was corrected by the Court of Appeals of the Sixth Judicial Circuit.

The *Dietzgen Case* (*Eugene Dietzgen Co.* v. *Federal Trade Commission,* 142 F. (2d) 321, C. C. A. 7, 1944)

is the one and only instance of a respondent raising the question of the authority of the Trade Commission to proceed against a combination in restraint of trade upon the theory that it is "an unfair method of competition". The Court was erroneously led to believe that the point was one involving judicial interpretation of the term "unfair methods of competition" as used in Section 5 of the Trade Commission Act. In that case, argued and decided before the decision by this Court in the *Alkali Case*, the parties relied primarily on chance phrases and incidental references appearing in prior decisions. The background and Congressional history of the Trade Commission Act and other statutes was not presented to the Circuit Court of Appeals. Had this been done, that Court might have perceived that the question was one which Congress had not left to judicial determination.

Furthermore, the Circuit Court of Appeals in deciding the *Dietzgen Case* erroneously depended upon certain earlier decisions of this Court wherein was found some phrase or "obiter dicta" which, when lifted from the context, might support an inference that the Trade Commission Act could be extended to include violations of the Sherman Act. The question of the Commission's statutory authority to enforce the Sherman Act was not raised or briefed by any of the parties proceeded against by the Commission in any of these cases, as an examination of the briefs and opinions will show. These cases are: *Federal Trade Commission* v. *Beechnut Packing Co.*, 257 U. S. 441, (1922);

Federal Trade Commission v. *Pacific States Paper Trade Association*, 273 U. S. 52, (1927); and *Fashion Originators Guild* v. *Federal Trade Commission*, 312 U. S. 457, (1941).

The opinions in all of these cases are, in some fashion, dealt with in the Petitioner's brief, now before this Court,—not directly but only as containing certain phrases which appear to give at least a superficial support to the Trade Commission's claim of authority to share with the Department of Justice authority to enforce the Sherman Antitrust Act.

> "It is settled that practices which are unlawful under the Sherman Act constitute 'unfair' methods of competition within the meaning of the Federal Trade Commission Act."

So says the Government brief at page 38.

This assertion is supported by a quotation of a most appropriate sound. "The Act undoubtedly was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed." (*Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 310.)

A second quotation is added to the first:

> "The Sherman Act 'shows a declaration of public policy to be considered in determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress.'" (*Federal Trade Commission* v. *Beechnut Packing Co.*, 257 U. S. 441, 453.)

Now a third quotation with a more impressive sound completes the foundation for the original declaration that on this point the law is "settled". "If the purpose and practice of a combination 'runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition'" (*Fashion Originators' Guild, Inc.* v. *Federal Trade Commission,* 312 U. S. 457, 463), and one last touch completes and clinches the evidence that it is settled

> "It was 'the object of the Federal Trade Commission Act to reach not merely in their fruition (as does the Sherman Act) but also in their incipiency' practices which may lead to restraints of trade condemned by the Sherman Act." (Idem. p. 466.)

Now let us study and examine this foundation upon which the entire structure of the Government's case depends. Let us pause for a moment to refresh our memories and to make certain of the exact form of the Government's primary No. 1 question. It appears on page 2 of the Government's brief. Minus the surplus words, here it is:

> "(1) Whether a combination among respondents * * * having the effect and purpose * * * of eliminating price competition among themselves, is an unfair method of competition within the meaning of the Federal Trade Commission Act."

First, we suggest a brief consideration of the several quotations, separated from their context, as we

find them in the Government's brief. Which if any of them literally taken will support the statements that

> "It is established that the prohibitions of the Federal Trade Commission Act apply to acts and practices which violate the Sherman Act" (Government Brief, pp. 29-30);

or that

> "It is settled that practices which are unlawful under the Sherman Act constitute 'unfair' methods of competition within the meaning of the Federal Trade Commission Act" (Government Brief, p. 38)?

Not one of them!

Now let us put them back into their context in the respective opinions from which they were lifted and seek the answer to the most vital question.

Which if any of these opinions involved the No. 1 question stated by the Government (Government Brief, p. 2):

> "(1) Whether a combination among respondents, * * * having the effect and purpose of * * * eliminating price competition among themselves, is an unfair method of competition within the meaning of the Federal Trade Commission Act,"

as a controverted issue raised by respondents to a proceeding instituted by the Trade Commission?

Not one of them!

The first decision cited by the Solicitor General to support the Commission's jurisdiction (p. 38), *Federal*

Trade Commission v. *Keppel & Bro., Inc.*, 291 U. S. 304, 310 (1934), did not pass upon the question of jurisdiction presented in the instant case. No combination in violation of the Sherman Act was involved. The question was if the sale of candy by the "break and take" gambling method was unfair. Justice Stone, in the phrase quoted by the Solicitor General, did not hold that a violation of the Sherman Act was an "unfair method of competition"; he was calling attention to the various unfair methods discovered in Sherman Act prosecutions, just as Justice Brandeis, in *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 434, showed that "unfair methods of competition, which the investigation of the trusts had laid bare, led to the creation of the Federal Trade Commission." This is clarified by Justice Stone's opinion in the *Alkali Case* in 1945, wherein with respect to the Sherman Act, he states; "But the Commission does not enforce the antitrust laws." (325 U. S. 196, at p. 208.)

In the *Beechnut, Pacific States* and *Fashion Originators Guild* cases, the jurisdiction of the Commission to enjoin a violation of Section 1 of the Sherman Act was not in question. The Congressional history of the Trade Commission Act and subsequent Acts set forth in this brief, was not before the Court. The question of the Commission's authority to assume the duties of the Attorney General and its usurpation of the jurisdiction specifically and exclusively invested in the Courts of the United States was not considered by this Court. Mere incidental refer-

ences to the policy declared by the Sherman Act or to decisions relating to the Sherman Act occurring in opinions which do not deal with the question now before this Court are not to be distorted into a holding by this Court on a question of jurisdiction which was ignored. The *Beechnut* decision, the keystone case relied upon and cited in the two subsequent decisions, illustrates the point. A pure question of an "unfair method of competition" was before the Court. Both the agreed statement of facts and the findings of the Commission recited that the "merchandising conduct" of the Company "does not constitute a contract or contracts whereby resale prices are fixed, maintained, and enforced." (See Record in *Beechnut Case*, pp. 35 and 43; see also reference thereto in opinion by Justice Day in 257 U. S. at page 454.) While Justice Day refers to the "public policy" declared in the Sherman Act, he clearly states, "The Sherman Act is not involved here * * *" (257 U. S. 441, at p. 453). The Court condemned the "merchandising conduct" of the Beechnut Company, not as a violation of the Sherman Act, but because it was an "unfair method of competition."

To the extent that any of the trade commission proceedings reviewed by this Court may be incidentally tangential to the field of combination in restraint of trade, they create no precedents on the point of jurisdiction for the first time squarely presented to this Court. This principle is well covered in a very late opinion of this Court:

"The mere fact that the case was entertained

by this Court is no basis for considering it as authoritative on the jurisdictional issue, it being the firm policy of this Court not to recognize the exercise of jurisdiction as precedent where the issue was ignored." (*Ayrshire Collieries Corp., et al* v. *U. S.*, 91 L. ed. Adv. Op. 1006, at p. 1009, April 28, 1947. See also *Holiday* v. *Johnston*, 313 U. S. 342, at 352.)

This Court has consistently held the Federal Trade Commission closely within the "powers and duties" defined in the Trade Commission Act when the Court's attention has been directed to the Commission's trespasses in this regard.

In *Federal Trade Commission* v. *Gratz*, 253 U. S. 421 (1920), the first Commission proceeding to reach this Court, the Commission was confined very strictly to its statutory authority. Justice Brandeis, though dissenting, recognized that the Commission, "**instead of enjoining the continuance of prohibited combinations** and compelling disintegration of those formed in violation of law, * * *", had other duties. (pp. 434-5.) (Emphasis ours.) In *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349 (1941), this Court held that the Commission had no jurisdiction, under its limited statutory authority, over intrastate activities,—that any such extension of its authority must "await a clearer mandate from Congress."[39] * * * "This case presents

[39] In so holding this Court followed the principle declared in *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, (1904):

"We cannot suppose it was intended that the en-

the narrow question of what Congress did, not what it could do. And we merely hold that to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires, in view of all the relevant considerations, much clearer manifestation of intention then Congress has furnished." (p. 355.)

This Court in *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619 (1927), again confined

> forcement of the Act (Sherman Act) should depend in any degree upon original suits in equity instituted by the states or by individuals to prevent violations of its provisions. On the contrary, taking all the sections of that act together, we think that its intention was to limit direct proceedings in equity to prevent and restrain such violations of the antitrust act • • • to those instituted in the name of the United States, under the 4th section of the Act, by district attorneys of the United States, acting under the direction of the Attorney General; • • • Congress has prescribed a specific mode for preventing restraints upon it (commerce),—namely, suits in equity under the direction of the Attorney General." (pp. 70-71.)

In 1914 Congress gave its clear mandate and authorized private suits to restrain violations of the Sherman Act, (Clayton Act, Section 16; 38 Stat. 737; 15 U.S.C.A., Sec. 26); but the district attorneys under the direction of the Attorney General remain the only officials of the United States with authority to institute court proceedings to restrain violations of the Sherman Act.

the Trade Commission within the scope of the "powers and duties" defined in the Act by which it was created. This Court held that "The Commission had no authority to require that the company divest itself of the ownership" of property, saying "that if the ownership * * * has produced any unlawful status, the remedy must be administered by the courts in appropriate proceedings therein instituted." (p. 625.) Justice Stone, though dissenting, recognized that,

> "In determining the meaning of 'unfair methods of competition', it should be borne in mind that the Trade Commission's function is to discourage certain trade tendencies before violations of the Sherman Act have occurred. The advised use of the phrase 'unfair methods of competition', for the more familiar 'unfair competition' of the common law, indicates an unmistakable congressional intent to confer on the Commission the power, subject of course to the judicial review provided for in the act, to prevent unfair trade practices not included in the prohibition of the Sherman Act and of the common law. See Henderson, Federal Trade Commission, 36; *cf. Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, 66 L. ed. 729, 42 Sup. Ct. Rep. 384." (p. 628.)

Henderson, *Federal Trade Commission*, cited by Justice Stone, refers to the Congressional History of the Act and concludes, "It covered only acts of competition, not agreements, or combinations limiting or

putting an end to competition between the parties." (p. 37.)

In proceedings by the Federal Trade Commission under the specific statutory authority to enforce certain sections of the Clayton Act, this Court likewise has kept the Commission within its statutory authority. The Court has repeatedly held, as in *Arrow-Hart & H. Electric Company* v. *Federal Trade Commission*, 291 U. S. 587 (March 12, 1934):

> "* * * If the merger of the two manufacturing corporations and the combinations of their assets was in any respect a violation of any anti-trust law, as to which we express no opinion, it was necessarily a violation of statutory prohibitions other than those found in the Clayton Act. And if any remedy for such violation is afforded, a court and not the Federal Trade Commission is the appropriate forum. * * *" (p. 599.)

To the same effect are *Thatcher Manufacturing Co.* v. *Federal Trade Commission*, 272 U. S. 554, 561, and *Swift & Company* v. *Federal Trade Commission*, 272 U. S. 554, 562.

Bias and Prejudgment.

Marquette's position accords with the holding of Justice Sutherland in *Humphrey's Extr.* v. *U. S.*, 295 U. S. 602, 624, with respect to the Federal Trade Commission:

> "The Commission is to be non-partisan; and it must from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law." (p. 624.)

The following cases set aside orders of administrative tribunals or of judges in the absence of any statutory provision on the ground that the full and fair hearing before an impartial tribunal, guaranteed by the due process clause, had not been accorded:

N. L. R. B. v. *Phelps*, 136 F. (2d) 562, 563-4, C. C. A. 5.

Morgan v. *U. S.*, 304 U. S. 1, 22; 82 L. ed. 1129, 1134.

Morgan v. *U. S.*, 298 U. S. 468, 480; 80 L. ed. 1288, 1295.

Tumey v. *Ohio*, 273 U. S. 510, 535; 71 L. ed. 749, 759.

Ohio Bell Telephone Co. v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 304-305; 81 L. ed. 1093, 1101-1102.

State v. *Board of Education*, 19 Wash. 8, 52 Pac. 317, 319.

N. L. R. B. v. *Cherry Cotton Mills*, 98 F. (2d) 444, 446, 1021, C. C. A. 5 (wherein the Board withdrew its proceeding for enforcement).

Berkshire Employees Association v. *N. L. R. B.*, 121 F. (2d) 235, 238-239, C. C. A. 3.

Inland Steel Co. v. *N. L. R. B.*, 109 F. (2d) 9, 20-21, C. C. A. 7.

Matter of Underhill, 32 Hun. (N. Y.) 449, 450.

Inhabitants of Readington v. *Dilley*, 24 N. J. L. 209, 213-214.

People v. *Elmdorf*, 98 N. Y. St. Rep. 775, 776.

State v. *Aldridge*, 212 Ala. 660, 103 So. 835.

People ex rel. Rusch v. *Cunningham*, 308 Ill. App. 63, 64, 68.

Oakley v. *Aspinwall*, 3 N. Y. 547, 552.

People ex rel Pond v. *Trustees*, 4 App. Div. 399, 403.

Meyers v. *Shields*, 61 Fed. 713, 725, C. C. Ohio.

Boxley v. *Wright*, 84 Okl. 45, 202 Pac. 306, 307-308.

Frome United Breweries Co. v. *Bath Justices*, (1926) A. C. 586, House of Lords.

In re City of Rochester, 208 N. Y. 188, 101 N. E. 875, 877.

Ford Motor Company v. *N. L. R. B.*, 305 U. S. 364, 83 L. ed. 221 (wherein the Board set aside its order).

Montgomery Ward and Company v. *N. L. R. B.*, 103 F. (2d) 147, C. C. A. 8.

N. L. R. B. v. *Washington Dehydrated Food Company*, 118 F. (2d) 980, C. C. A. 9.

The right to a fair trial by an impartial tribunal is not a statutory right, to be given or taken away as the legislature wills. The right to such due process of law is one of the fundamental rights, part of the "law of the land."

Davidson v. *Board of Admrs. of New Orleans*, 96 U. S. 97, 101.

Railroad Commission of California v. *Pacific Gas and Electric Co.*, 302 U. S. 388, 393; 82 L. ed. 319, 322.

St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38, 51, 73, 84; 80 L. ed. 1033, 1041, 1052, 1058.

Jordan v. *Massachusetts*, 225 U. S. 167, at p. 176; 56 L. ed. 1038, at 1042.

N. L. R. B. v. *Ford Motor Co.*, 6 Cir., 114 F. (2d) 905, 909.

The biased and prejudiced approach by the Commission in the instant case, having publicly announced prejudgment of the issues in its official reports, is to be distinguished from that "reason to believe" contemplated by Section 5 of the Commission's organic act.

Hawkins v. *Common Council of City of Grand Rapids*, 158 N. W. 953, 957; 192 Mich. 276 (1916).

Here ends the brief of the Respondent Marquette, pertaining to the several reasons for vacating the "Cease and Desist Order" of the Federal Trade Commission, in addition to those set forth in the able Opinion of the Court of Appeals, which is based upon an exhaustive study of the entire record. That Opinion considered the many deficiencies and errors in the Commission's "Findings as to the Facts" and reviewed the evidentiary record. None of these things have any bearing upon or relation to the "Additional Reasons For Sustaining The Judgment Of The Court Below" herein presented on pages 9 and 10. These points, involving Jurisdiction and other questions of due process arising under the Fifth Amendment to the Constitution of the United States, being soundly based, any of them, there will be no need to delve further into the maze of testimony, economic theory and argument contained in the evidentiary record and the Commission's "Findings."

However, the Solicitor General's brief apparently presents the Commission's "Findings" as compliance with the Rule 27 of this Court, which requires a concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate page references to the printed record. Since Divisions B, C and F of the Petitioner's brief purport to be based upon the essential evidentiary facts of record, as we understand the rule, there should be somewhere in the Petitioner's brief a concise, accurate and

properly documented "Statement of Facts." No such Statement appears. We deem it proper that this Court should have such a Statement before it for whatever convenient use it may be. Therefore, in Part Two of this brief, a separate volume, the section before the appendix is devoted to that end.

Respectfully submitted,

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